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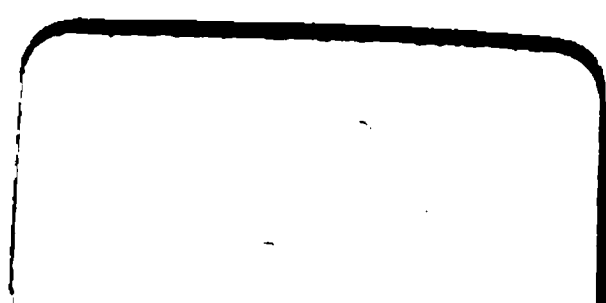
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A
GENERAL TREATISE
ON THE
PRINCIPLES AND PRACTICE
BY WHICH *637c*
Courts of Equity
ARE GUIDED AS TO
THE PREVENTION OR REMEDIAL CORRECTION
OF
F R A U D:
WITH
NUMEROUS INCIDENTAL NOTICES OF COLLATERAL POINTS,
BOTH OF
Law and Equity.

By JOHN EYKYN HOVENDEN, Esq.
OF GRAY'S INN, BARRISTER AT LAW.

" ————— quanto *illa* magis formas se vertet in omnes,
" Tanto magis contende tenacia vincla."
VING. GEORG. IV. 411, 412.

VOL. I.

LONDON:

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PREFATORY

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THE design and scope of this Treatise will be found developed in the introductory chapter: any defects in the execution of the proposed plan (and such will, no doubt, be found in abundance,) would be but indifferently atoned for by a long repetition of apologetic explanations, and attempts at palliation, founded on the very extensive and complex nature of the subject.

To any such plea as that intimated above, it might be forcibly objected, that, no one is obliged to undertake a task, of this kind, to which his powers are incommensurate; and the only reply which suggests itself would be, to urge the utter improbability, if this precautionary rule were rigidly adhered to, that, any general treatise upon the present subject should ever appear.

Without denying, or doubting, that, many individuals, possessing all the qualifications requisite to make such a work complete might be pointed out; it may still be alleged, with some confidence,

that, since such learned persons can employ their time so much more advantageously to themselves, in a different manner, they are extremely unlikely to make the very great personal sacrifice, which a devotion of their labors to a treatise of this kind would necessarily entail.

Should the unreasonableness of expecting such a sacrifice be admitted, the case will resolve itself into this question—if a perfect work cannot, with probability, be hoped for, must one of inferior execution be necessarily useless? They who adopt the affirmative, will, of course, not trouble themselves with the present publication. To those whose demands upon an author's ability are not so high, this work is offered; not without the hope, (the avowal of which it would be affectation to suppress,) that, it may be found a convenient book of *reference* by practitioners in every branch of the profession.

This object of convenient and easy reference has never been lost sight of: the authorities cited, in support of every proposition advanced, will, it is believed, bear out the text; it is certain, that, none of those authorities have been stated upon trust, at second hand, or without personal examination; in selecting them, precise appositiveness has been the aim, not number; or rather, multi-

PREFATORY ADVERTISEMENT.

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plicity of references to establish a single point has been studiously avoided, from a conviction, (the result of experience,) that, such multiplicity is not calculated to afford a steady, or at all events not a prompt, guidance: since it is scarcely possible, that, a number of decisions should be brought together, in some of which (though all bearing, in the main, upon the same point,) general principle has not been modified by accessorial circumstances. Decisions so qualified, restricted, or extended by collateral incidents, it has been attempted to keep distinct; not omitting to notice them, but not confusedly mixing them up with the broad general rules, upon any subject here discussed.

To cite a long case, for a particular doctrine recognized therein, but which case embraces many other distinct topics, yet to give a mere general direction to the volume in which it is reported, and to the page in which such report commences, shortens an author's labors, unquestionably; but, it is only by shifting the trouble of discriminating research from himself to his reader: in this treatise, the very page in which the authority relied on may be found, is, in almost every instance, intended to be referred to; some errors of transcription, or of the press, in this respect, it is not doubted, will have escaped notice; but, it is hoped, they will not be found numerous.

An alphabetical table of the cases cited is prefixed to the first volume, enabling the reader, at a glance, to ascertain whether any particular decision is here noticed; and, if so, guiding him to the place where he may see by what other authorities that decision is supported, qualified, or contradicted.

A connected and synthetical Index, of the contents of each principal division of the work, is subjoined at its close; combined with an analytical Index of the collateral subjects treated of. Facility of reference, (which in the body of the work made brevity desirable as far as that was consistent with perspicuity,) here obviously indicates the propriety of copiousness: the shorter points of any treatise are precisely those which stand most in need of an index to make them readily accessible; and no one will contend, that, it is enough if all the important contents are found, somewhere or other, in an index; or deny that it is desirable they should be referred to under each title where they may probably be sought; particularly, when this can, in most cases, be done by a single figure. On this head, indeed, the author is less afraid of being charged with redundancy, than of being reproached for deficiencies; as he is sensible there are doctrines laid down in the body of his work, and there supported by authorities,

to which passages no corresponding reference will be found in the Index. Pains, however, have been taken to prevent the frequency of such omissions; for, although the minute drudgery of index-making is what no writer would willingly undertake, still, his readers have a right to expect it from him as a matter of duty: with respect to books of general literature, indeed, this is a distinct department, with which the author of any work seldom interferes; but the writer of a law treatise must make his own index.

A running abstract of the principal contents of each page will be found in the margin thereof; if this should be thought a work of supererogation, it will, at least, not add to the bulk of the work; it only occupies space which would otherwise have been left blank; the additional labor rests, exclusively, with the author; the convenience different readers may estimate differently; but that convenience, it is believed, will not, by economists of their *time*, be thought inconsiderable.

Some doctrines discussed in this treatise have appeared almost equally applicable to more than one division of the work; but generally, even in these cases, some distinctive character has been found to direct their appropriation to a particular chapter; and where a notice of the same subject has been called for in a different part of the work,

this has, usually, been effected by a mere reference. In a few instances, however, it has been deemed essential to the integral unity of each of two distinct chapters, to advance, in terms, the same proposition in both: and, when the propriety of so doing has been felt, no attempt has been made to disguise the repetition, by any studied variation of phrase, or by a different selection of authorities.

Correction of errors, even if inflicted with caustic severity, the author will endeavour to profit by: hints for improvements, suggested with indulgence, will be entitled to, and will assuredly receive, his grateful acknowledgments. Such as the work is in its present state, it must, now, be offered to the Public, unpatronized: if it be worthless, the name of the highest patron could not uphold it; if it shall be found to possess utility, and afford convenience, it will require no other patronage.

5, NEW SQUARE, LINCOLN'S INN,
17th March, 1825.

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ERRATA ET ADDENDA.

Vol. 1, p. 256, note (*s*), for *chap.* 30, read "chap. 32."

———— 260, note (*h*), add "c. 14, s. 16."

———— 415, for *it*, read "the statute of distributions."

Vol. 2, p. 28, note (*d*), for p. 233, *3rd Edit.* read "p. 251, 5th Edit."

ALPHABETICAL

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A

GENERAL TREATISE

ON THE

Jurisdiction of Courts of Equity

IN MATTERS OF

F R A U D.

CHAPTER I.

Introduction.—Rise and progress of the equitable jurisdiction—its importance, extent, and limits—proposed division of the subject—and a vindication of Lord Hardwicke's doctrine, that, "fraud may, in Equity, be presumed;" understanding the word "presumption" according to the sense in which it was used by that great Judge.

WHILST almost every minor subdivision, whether of the principles or the practice of Courts of Equity, has been illustrated by the labors—not of one, but, in many instances,—of several writers; it is somewhat singular that no treatise should, yet, have been devoted to a general digest of the doctrine with respect to the most fruitful head of equitable jurisdiction,—FRAUD.

No previous
general treatise
on Fraud.

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The two justly esteemed works of Mr. Roberts, already published, form no exception to this statement: they, it is well known, are confined to the examination of frauds in contravention of particular statutes; which, to adopt his own well chosen language, are “merely supplemental to general principles:” and the more extended treatise, which the legal profession has, for years, been taught to expect from the pen of that gentleman, even when the desirable undertaking shall be completed, will, as far as a conjecture can be formed from the terms in which it is announced, be sufficiently distinct from the present essay.

To supply that deficiency is the object of the present work.

An exposition of the practice engrafted upon general principles by Courts of Equity, and the preventive, or remedial, application of both to the multiplied artifices of every description of fraud, is the proposed subject of the present volume; and those who are best able to appreciate the extent of the task thus undertaken, will, probably, pass the most lenient judgment upon its imperfect execution.

Extensive nature, and difficulty, of the attempt.

Such readers, if any of this description should honour the author by their attention, will be aware, that, to condense, within a moderate compass, the substance of all the reported decisions under so extensive a title as that of Fraud, is a project not to be *et semel inceptum et simul perfectum*: it will sufficiently gratify a moderate ambition to have led the way, and to have facilitated a more complete and systematic arrangement of the subject by future and abler writers. It would, no doubt, be easy to put forth a publication impos-

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ing by its voluminous magnitude; *that* might be accomplished without any mental exercise, and with little more manual labour than could be executed with a pair of scissors, by an adept in the art of book-making: but if, instead of such a *rudis indigestaque mōles*, the plan aimed at be, to prepare, and arrange, a compendious manual; omitting no head of a most extensive subject, and supporting every collateral branch thereof by an express authority in point, establishing the present doctrine of the Courts, where that is settled; or supplying the best materials for forming a probable opinion upon points not definitively fixed; to execute this, perfectly, would require talents, learning, powers of selection, separation and combination, leisure, industry and experience; in short, such an union of various qualifications, as might well deter the present writer (not so ignorant as to be unaware how many of these requisites he is deficient in,) from attempting such a task; did it appear at all probable that it would be undertaken by any one fully fitted for its accomplishment; until some pioneer should, in part at least, have cleared the way, and brought together the materials, in readiness to receive the disposition of a master-hand. They who, by their connexions with that class of the profession which, alone, has the power of doing so, have been introduced into early practice; and they who, by pre-eminent talents have, without such aid, forced themselves into notice, cannot, whatever their acquirements may be, have leisure for the laborious research required by works of this kind; which they must,

The labours of future, and abler, writers may be facilitated by this undertaking, though in itself imperfectly executed.

The time required, in the first instance,

to collect materials for works of this kind, cannot be afforded by gentlemen in full practice.

not unwillingly, resign to those who are not occupied by more lucrative employment; the number of the latter description will always, naturally and properly, be considerable; and (a) "*nobis stet illud, vivere in studiis nostris: non deesse, si quis adhibere volet, non modo ut architectos verumetiam ut fabros; sin nemo utetur operá, tamen et scribere et legere πολιτείας (τῶν νόμων), et si minus in curiá atque in foro, at in literis et libris, ut doctissimi veteres fecerunt, navare operam (b), et de moribus ac legibus quærere. Mihi hæc videntur.*"

The origin, and progress, of the jurisdiction of Chancellors briefly traced,

Any extended antiquarian disquisition into the origin of the jurisdiction of the Court of Chancery would be foreign to the design of this treatise. The man of leisure and curiosity may find amusement in such researches; and may smile at the vehemence, with which conflicting opinions upon the subject have been maintained: but, for practical purposes, (and in the present instance, merely with a view to show how the equitable jurisdiction with respect to Fraud originated, and how far it extends), a brief outline of the best authenticated conclusions will suffice.

Sir

(a) *Ciceronis Epist. 2a. ad Varronem; Epistolar. lib. 9.*

(b) It will be seen, that I use the reading of Lambinus, whose emendation, whether approved, in this instance, by the Critics, or not, is at all events most suited to my present purpose: the common text has *republicam*; but, although jurisprudence

forms no unimportant branch of political economy, the introduction, otherwise than most briefly and incidentally, of abstract politics into a book of professional practice would be misplaced; upon this principle I have inserted (τῶν νόμων) parenthetically, to restrict the generality of the word πολιτείας.

Sir William Jones, whose elegant deductions ^{to the Archon of the Athenians,} succeeding writers have (frequently without acknowledgment) transcribed, has traced back to the chief Archon of the Athenians a jurisdiction analogous to that of our Chancellors (c). This, like other analogies, should only be admitted with discrimination; and the shades of distinction will display most advantageously our, comparatively modern, but far better constituted, establishment.

The less elegant, but equally sagacious, historian of Greece (d) has suggested, that "Aristotle was, probably, induced to repose plenary discretion in the chief magistrate of his imaginary commonwealth, from an observation of the opposite extravagance at Athens; where decrees of the multitude, there the unbalanced sovereign, at the suggestion of demagogues, favorites of the moment, were so multiplied, with such haste and so little circumspection, that, in many cases, the citizens could not know to which of many laws they were actually subject." It is, indeed, an observation at least as old as Aristotle (e), and one so obvious as, probably, to have been of much earlier date, that it is quite impracticable for any system of law, however comprehensive, to embrace every possible case: it was, therefore, the practice of the early Grecian commonwealths to leave it to the discretion of the presiding magistrate, to deal, ^{and the early Grecian commonwealths, generally:} as circumstances should require, with cases not provided

(c) See Sir W. Jones's Works, 43, Sect. 3, of his Hist. Vol. 9, p. 142. 8vo. Edit. (e) See his *Polit. lib.* 1, cap. (d) W. Mitford. See Chap. 3 & 4.

provided for by positive institution;— in other words, to make a law for the occasion: and the only palliative for this tremendous power which the ingenuity of the great Stagyrte could suggest, was to give, in his imaginary polity, such an education to, and encourage such principles in, those to whom arbitrary judicial discretion was to be confided, as should insure it against abuse.

as also to the Roman institutions, whether under Republican, Imperial, or Pontifical government. The office of Chancellor not unknown to the Saxons, or even the antient Britons.

The Court of Chancery unquestionably established in this country, as the *officina brevium*, before time of legal memory;

An imperfect tenure this, we should now think, for property and civil rights! Still, the Archon of the Athenians may be acknowledged as, in some respects, the rude prototype of a British Chancellor; the Prætor appears to have been the nearly corresponding officer under the Roman Republic (*f*); both the office and the name were in use under Imperial Rome (*g*), and have been preserved to modern times by the Pontifical institutions; we are also told (*h*), that the Saxon, and even the British Monarchs, in the most remote periods, had their Chancellors.

At all events, that, in this country, the Court of Chancery, as a Court of Law, and the *officina brevium*, existed previous to the earliest records of our legislature, we have evidence, in the resolution of all the judges of England, in the 9th year of the reign of Edward the 4th, stating, that “the four Courts at Westminster were all before time of memory (*i*).”

But,

(*f*) *Digest. lib. 1, tit. 1. 7.*

(*g*) Cassiodorus, *lib. 12, formula 1.* Flavius Vopiscus, *apud Hist. Aug. Script.*

(*h*) Mirror, cap. 1, sect. 3. 4th. Instit. 78.

(*i*) See the Year Book, *ad annum*, fol. 53, b.

But, for the peculiar and distinct jurisdiction of our Courts of Equity, no such high antiquity can be claimed: The Court of Star Chamber seems to have been their elder sister (*k*); as we find that Court fully established in the twenty-eighth year of the reign of Edward III: and learn (*l*) that its proceedings were by English Bill, or information; by the examination of the defendants upon interrogatories; by examination of witnesses upon depositions, and, rarely, *ore tenus*; and, further, that all the writs and process of the Court were under the great seal. Striking as this similarity appears; and much as the resemblance is strengthened, by the principle upon which the authority of this Court was justified;—namely, that, “the proceeding according to the laws and customs of this realm could not by one rule of law suffice; and, therefore, this Court so dealt that the medicine might be according to the disease;” yet there is one circumstance which raises a strong and clear line of demarcation between the Court of Star Chamber and the Court of Chancery; the former took cognizance of criminal offences, and was employed as an engine of state (*m*) for the purposes of despotism; the latter is conversant, in right of its *peculiar* jurisdiction, only with questions of property, and the maintenance of civil rights.

but its peculiar equitable jurisdiction of later date: and fully acquired only upon the dissolution of the Court of Star Chamber, by which it was previously exercised.

Distinction between the two Courts: the Star Chamber took cognizance of criminal, as well as civil, offences; the peculiar jurisdiction of Chancery applies to civil rights only.

That

(*k*) *Lib. Assis.* p. 22, pl. 52.

(*l*) 4th. Instit. 63.

(*m*) *Camd. Britan.* in Introduction. And see the stat.

16 Car. 1, cap. 10, by which the Court of Star Chamber was abolished.

An approximation to the date at which the equitable jurisdiction of Chancery was first, imperfectly, established.

That the Court of Chancery did not possess its present power of equitable jurisdiction, at the time when the valuable work entitled "Fleta" was written, is evident; for its author limits the duties and authority of the Chancellor to the custody of the King's Seal, and the formation of Original Writs (*n*). Selden has satisfactorily shewn (*o*), that, the book just cited was written during the reign, probably late in the reign, of Edward II.; and we have the testimony of the Statute Book (*p*), that, in the seventeenth year of Richard the Second's reign, the authority of the Court of Chancery was sanctioned by the legislature (*q*): it is between these two periods, then, that we must place the first imperfect origin of that peculiarity in our system of jurisprudence, which, strengthened by successive improvements, and tempered by wise restrictions, has "produced a purity in the administration of justice, that could not, perhaps, have been effected by other means (*r*)."

Advantages of keeping the provinces of Common Law and of Equity distinct; thus preserving the simplicity and precision of one;

The peculiarity alluded to, consists in keeping the provinces of Law and of Equity distinct; thus preserving to the Courts of Common Law the advantages of simplicity and precision, which they could not enjoy if their established forms of proceeding were suffered to bend to, and be modified by, the equitable circumstances of each particular

(*n*) See Fleta, lib. 2, cap. 13.

(*q*) Reeve's Hist. of Engl.

(*o*) See his Dissert. cap. 10,

Law; vol. 3, p. 194.

sect. 1.

(*r*) Lord Redesdale's Treat.

(*p*) Stat. 17 Ric. 2. cap. 6.

on Eq. Pl. p. 6.

particular case: whilst, at the same time, the intolerable inconvenience which must arise from a rigid adherence to rules too narrow to embrace complicated questions, is obviated, by the institution of a Court empowered to “supply what is defective (*s*),” and to “control what is unintentionally harsh (*t*),” in the operation of general principles.

and, at the same time, admitting the just and temperate modifications of the other.

The equitable jurisdiction of the Court of Chancery, as now established, extends to almost all questions involving civil rights, for which no remedy is provided by the course of the Courts of Common Law; and also (as will, in the proper places, be shewn), to many cases in which the Spiritual, the Admiralty, and the Common Law Courts have a concurrent jurisdiction.

Extent of the equitable jurisdiction of the Court of Chancery:

Equity, or natural justice, is the rule by which, where positive law is either silent, defective, or not clearly defined, the decisions of the Court of Chancery are guided; and, in all new cases, the conscience of the Judge who presides in any branch of that Court must, of necessity, be the standard by which justice is measured. This, certainly, appears an alarming power, requiring to be checked and counteracted by the most guarded precautions: for though, in every state, and under every form of government, supreme authority must be lodged somewhere; yet, to commit without restraint both the enactment of laws *pro re natâ*, and also their administration,

and rules by which the exercise of that jurisdiction is guided.

In new cases, the conscience of the Judge is, necessarily, the measure of Equity: a latitude of power which requires guarded counteracting precautions, to render it compatible with the other institutions of a free country.

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(*s*) Puffendorf, *Jurisp. Univers.* lib. 1, sec. 22.

(*t*) Pasquier, *Recherches*, 88.

to one and the same individual; would be to create the most naked and undisguised despotism: it has, therefore, ever been the most difficult problem in the theory of government,—*the experimentum crucis* of legislative wisdom,—to provide for the equitable “correction of that wherein the law, by reason of its universality, fails (*u*);” without permitting such an uncontrolled, declaratory and dispensing power, as, under the specious colour of equity, might establish an intolerable tyranny.

The checks by which any corrupt abuse of the powers of the Court of Chancery is restrained.

But, with respect to the Court of Chancery, when it is recollected, that, as before has been mentioned, all treasons and political offences, and, generally (*w*), all criminal charges having a tendency to excite the passions and prejudices of men, are out of the jurisdiction of the Court; alarm will be lessened: and if it be further considered, how many checks are imposed upon hasty decisions,—by the opportunity of rehearings; by the power of appealing from the several subordinate branches to the superior department of the Court itself; by the right of Parliamentary Appeal; and, above all, by the salutary control of public opinion, so powerful in this free and happy country; every apprehension of corrupt abuse must vanish.

It

(*u*) Grotius *de Æquitate*, sec. 3.

(*w*) An exception must be made as to *infants*; “a dealing with an infant may amount

to a *crime*, which it is the peculiar province of this Court to take cognizance of.” *Gee v. Pritchard*, 2 Swanst. 413.

It should also be borne in mind, it is only in cases of the first impression that Courts of Equity consider the exercise of their allowed discretion as unfettered; "principles of decision, when fully established, and made the grounds of successive decisions, are considered by those Courts as rules to be observed with as much strictness as positive law (*x*)."

Authority of established principles of decision,

It will be observed by the reader, that, Lord Redesdale, in the passage quoted, speaks not merely of decisions, (that would be to narrow the position most injuriously), but of *principles* of decision; and where a case comes before a Court of Equity, which is clearly referrible to a principle upon which former successive judgments have been grounded, the Court feels itself bound by such prior decisions; and bows to their authority, even when unable to acquiesce in their original propriety (*y*). If an alteration appear absolutely essential to justice, the legislature should be applied to, as being, alone, competent to sanction the innovation.

not to be overturned, even when their original propriety is questionable; unless the innovation be authorized by the legislature.

This deference to precedent may offend the abstract notions of the theorist; but the practical lawyer

Importance of a strict adherence to precedents.

(*x*) Redesdale, p. 4, in note; citing *Burgess v. Wheate*, 1 Wm. Blacks. 152; see also *Cowper v. Cowper*, 2 P. Wms. 753, as to the principles which limit the discretionary powers of Courts of Equity.

(*y*) *Davis v. Duke of Marlborough*, 2 Swanst. 163; *Gee v. Pritchard*, *ibid.* 414; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 527; *Ellis v. Smith*, 1 Ves. Jun. 17; *Stebbing v. Walkley*, 2 Br. 86; *Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Sparrow v. Hardcastle*, Ambl. 227; *Tyrrell v. Hope*, 2 Atk. 559.

lawyer will agree, that, of all evils affecting property, the uncertainty of *jus vagum* is the greatest: to avoid this is of so much importance in administering the justice of the country, that, "not only if there has been a variety of cases upon any subject, but even if only one ancient case can be produced, and there has been practice and experience in favor of it," authority, second to none, has declared, "it ought to be adhered to (z)."

The remedial powers peculiar to Courts of Equity never called into action, unless where positive law is silent, or defective.

And even when no legal remedy can be obtained, the Court of Chancery will not act, universally, to prevent injustice; an equitable right, bringing the case within the peculiar jurisdiction, must be shewn.

It is scarcely necessary to add, in express terms, what has already been intimated, that, the remedial powers peculiar to Courts of Equity can be interposed only where positive law is silent, or defective (a): where the will of the legislature is clearly pronounced with regard to all the circumstances which belong to a case, equity "can neither take it up where the law leaves it, nor extend the remedy further than the law allows (b)." And it does not even follow, that, because, in any particular instance, there is no legal remedy, therefore, there must be an equitable one, unless there be an equitable right (c): neither is a Court of Equity bound to find an equitable effect for any instrument, merely because the construction put upon it in a Court of Law leaves it inoperative (d); circumstances must be shewn, bringing the case within

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| (z) <i>Att. General v. Mayor of Bristol</i> , 2 Jac. & Walk. 318. | Eden 335; <i>M'Leod v. Drummond</i> , 14 Ves. 360; <i>Serjt. Maynard's Case</i> , 2 Freem. 2. |
| (a) <i>Hale's Lords' Jurisd.</i> 46. | (d) <i>Gladstone v. Birley</i> , 2 Meriv. 404. |
| (b) <i>Heard v. Stanford</i> , Ca. temp. Talbot, 174. | |
| (c) <i>Wake v. Conyers</i> , 1 | |

within the principles upon which the peculiar jurisdiction is founded; for it is too general a ground to take, to say the Court of Chancery will act, *universally*, to prevent injustice (*e*).

This discreet reserve, however, as to the assumption of a novel jurisdiction, and this anxiety for the sanction of precedent, will not be carried such lengths as to paralyse the powers, and the consequent utility, of the Court: the suppression of Fraud, for instance, is one of the primary objects of its institution; and previous judgments cannot always be found, affording direct authority for the decision of subsequent cases: *crescit in orbe dolus*; but if a case arises of fraud, or *presumption* of fraud, to which even no *principle* already established can be applied, a new principle must be established to meet the fraud: for the possibility will always exist, that human ingenuity in contriving fraud may go beyond any cases which have before occurred; and as new devices of fraud are invented, they must be met by new correctives (*f*): taking care, of course, not to clash with former resolutions. With prospective sagacity, Courts of Equity have always avoided imprudently hampering themselves, by defining, or laying down, as a general exclusive proposition,

Qualification of the general rule which inclines Courts of Equity to tread in beaten paths;

exemplified in cases of Fraud.

If new devices of fraud are invented, to which no established principle of correction applies, a new remedial principle will be struck out.

Courts of Equity fettered by no definition of fraud, excluding cases not within such definition.

(*e*) *Gardiner v. Edwards*, 5 Ves. 592; the *dictum* in *Parkhurst v. Lowten*, 2 Swanst. 209, must be qualified as to its generality; and restricted (as it was, doubtless, meant) to cases where the interference of

equity is asked in cases similar to that which was then before the Court.

(*f*) *Webb v. Rorke*, 2 Sch. & Lef. 666; *Sawyer v. Vernon*, 1 Vern. 387.

proposition, what shall be held to constitute fraud (*g*).

Concurrent equitable jurisdiction of the Court of Exchequer; and its probable date:

The Court of Exchequer has a concurrent jurisdiction in matters of equity with the Court of Chancery. From what period this equitable jurisdiction of the Court of Exchequer should be dated, is uncertain: the first recognition of it in the statute book is in the thirty-third year of Henry VIII., ch. 39; but Lord Coke is of opinion, that it was of earlier origin, and that the Exchequer is a Court of Equity by prescription (*h*).

with the fiction upon which it appears to have been originally founded.

It was formerly deemed necessary, and is still usual, for a suitor to this Court to suggest that he is a "debtor and accountant to the Crown;" which suggestion the Court never would permit to be traversed: and even if it be omitted, the Court, it is said, will not at present (though the old practice was otherwise) entertain a demurrer for such cause (*i*).

The principles upon which equitable causes are decided in the Exchequer and in Chancery, the same;

The principles upon which the Court of Exchequer decides equitable causes are the same as those established in the Court of Chancery; and although some few instances of contradictory judgments may hereafter call for notice, yet, generally, and almost universally, the decisions of one Court are considered with the highest respect by, if not as precedents binding upon, the other.

(*g*) *Mortlock v. Buller*, 10 Ves. 306; *Lanley v. Hooper*, 3 Atk. 279; *Stileman v. Ashdown*, 2 Atk. 480.

(*h*) Fourth Instit. cap. 13.

(*i*) 1 Fowl. Exch. Prac. 3. §18.

other. Some differences in point of form, and some diversity in the extent of relief, granted by the two Courts respectively,—as, for instance, in the period up to which an account is decreed in a suit for tithe,—will be incidentally noticed, as the subjects arise; so far at least as these points may be found necessarily connected with the main object of this work; which is, to present a compressed, but general, view of the principles and authorities according to which Equity, in the correction of Frauds, is administered in the Court of Chancery; whether under its prescriptive or statutory jurisdiction; whether sitting in Equity or Bankruptcy; or by virtue of a specially delegated power of administration, as in cases of lunacy; which though not of necessity committed to the officer holding the Great Seal, yet generally attends him (*k*).

but with some differences in point of form, and in practice.

Summary of the main object of this treatise.

The three leading subjects which come more peculiarly under the cognizance of the Court of Chancery, are Frauds, Accidents, and Trusts (*l*): to some ramification from one or other of these stocks almost every exercise of the ordinary equitable jurisdiction of the Court may be referred; not only in cases which are primarily and exclusively submitted to its own decision, but, also, wherever it lends its aid as ancillary to, or, by its power of granting injunctions, curbs proceedings in, other Courts: to a developement of the first of these heads, which must, however, frequently

Frauds, accidents, and trusts, the three chief subjects of equitable jurisdiction;

not only in cases of which Chancery has primary cognizance; but where it is ancillary to, or acts in restraint of, proceedings in other Courts.

and

(*k*) *Oxenden v. Lord Crompton*, 2 Ves. Jun. 71.

(*l*) Fourth Instit. 84.

and unavoidably embrace a consideration of both the other, we proceed.

Many frauds relievable at common law;

In many cases of actual imposition, if the fraud can be clearly established, Courts of common Law will give relief; various instances of which are given in *Fermor's case* (*m*): but, it has been well observed (*n*), that, Lord Coke, by the same passage in which he confines the jurisdiction of Courts of Equity to "such frauds, covins and deceits for which there is no remedy by the ordinary course of Law (*o*)," admits that all frauds are not relievable at law: and Lord Hardwicke judicially declared, that, "the points of fraud and collusion establish the authority of the Court of Chancery, often contrary to, and beyond, the rules of Law (*p*)."
Thus, also, Sir Joseph Jekyll expressly said, "it is true, that may be a fraud in Equity which is not so at Law (*q*)."

but, in the correction of fraud, Equity goes beyond, and even, sometimes, contrary to the rules of Law.

The power which Courts of Equity, alone, possess, of compelling a defendant fully to answer the charges exhibited against him, peculiarly fits them for the investigation and redress of fraud.

The power which Courts of Equity, alone, possess, of compelling a defendant to put in a full answer to the charges exhibited against him, (provided such disclosure would not expose him to a penalty or forfeiture, and be not a breach of professional confidence), peculiarly fits them for bringing to light circumstances of imposition, which must, frequently, be confined to the defendant's own knowledge. This, indeed, is no longer disputed; Lord Mansfield, sitting as Chief Justice in

(*m*) 3 Rep. 77; and see Jenk. Cent. p. 254, pl. 45.

(*n*) Fonbl. notes to Treat. on Equity, p. 66.

(*o*) Fourth Instit. 84.

(*p*) *Garth v. Cotton*, 3 Atk. 755; *Man v. Ward*, 2 Atk. 229.

(*q*) *Trenchard v. Wanley*, 2 P. Wms. 166.

in the King's Bench, laid it down as unquestionable, that, " Courts of Equity and Courts of Law have a concurrent jurisdiction to suppress, and relieve against, fraud; but the interposition of the former is often necessary, for the better investigating truth, and to give more complete redress (r)."

The Court of Chancery, then, has an undoubted jurisdiction to relieve against every species of Fraud (s); with a single exception as to fraud in obtaining the execution of, or setting up, a will; which, if relating to personalty, can only be set aside by the Ecclesiastical Courts; if it relate to real estate, all a Court of Equity can do, in the first instance, is to direct an issue, *devisavit vel non*, to a Court of common Law (t).

With the single exception of fraud in obtaining the execution of, or setting up, a will; the Court of Chancery has undoubted jurisdiction to relieve against all frauds.

The variety of forms which Fraud may assume, would seem to set all systematic classification at defiance: Lord Hardwicke, however, has done much towards simplifying that branch of the subject which relates to *fraud in matters of contract*, by breaking it into five grand divisions (u): *First*, Actual fraud, arising from plain facts and circumstances of imposition. *Secondly*,
Fraud

Lord Hardwicke's classification of frauds, as relating to matters of contract;

First, actual fraud, evidenced by plain facts;

(r) *Bright v. Eynon*, 1 Burr. 396.

(s) *Colt v. Wollaston*, 2 P. Wms. 156; *Stent v. Bailis*, *ibid.* 219; *Bright v. Eynon*, 1 Burr. 396.

(t) *Pemberton v. Pemberton*, 13 Ves. 297; *Bennet v. Wade*, 2 Atk. 324; *Archer v. Mosse*, 2 Vern. 8; *Jones v. Jones*, 3

Meriv. 171, and 7 Price, 665; *Andrews v. Powys*, 2 Br. P. C. 476, 482, fol. edit.; *Kerrich v. Bransby*, 3 Br. P. C. 362; *Bransby v. Berridge*, 1 Eq. Ca. Ab. 406; and see *post*, under the title "Lunacy."

(u) *Chesterfield v. Jansen*, 2 Ves. Senr. 155.

Secondly, fraud which a consideration of the terms will make apparent.

Thirdly, fraud presumed from the unequal situation of the parties contracting.

Fourthly, fraud inferred where the transaction goes to deceive persons not parties to the contract.

Fifthly, catching bargains, which are generally compounded of several of the preceding species of frauds.

Examination of Lord Hardwicke's third division;

and its supposed inconsistency with decided cases discussed.

Fraud apparent from the intrinsic nature and subject of the bargain itself, being such as no man in his senses and not under any delusion would make on the one hand, and no honest or fair man would accept on the other; and of such unconscionable bargains even the common law has taken notice. *Thirdly*, Fraud *presumed* from the circumstances and condition of the parties contracting; and this goes farther than the rule of law,—which is that fraud must be *proved*, not presumed. *Fourthly*, Fraud collected or inferred, in the consideration of a Court of Equity, from the nature and circumstances of the transaction being an imposition and deceit *on other persons not parties* to the fraudulent agreement. *Fifthly*, that fraud which infects catching bargains: these have generally been mixed cases, compounded of all, or several, of the preceding species; there being sometimes actual fraud, which is always decisive; or it may be presumed or inferred from the circumstances of the parties contracting.

Before any attempt is made to illustrate the numerous subdivisions of this branch of our proposed subject, by a reference to actual decisions; it may be well to examine, whether Lord Hardwicke's third position, as above stated, is maintainable. The passage is seldom quoted in books of practice without a reference to the cases of *Townsend v. Lowfield* (w), and *Trenchard v. Wanley*;

(w) 1 Ves. Senr. 35; 3 Atk. 536: the statement seems best given in Vesey's report; the judgment in that by Atkyns.

ley (x); and a doubt, either expressed or implied, whether it is reconcilable with those authorities. In the first cited case, Lord Hardwicke himself said, "No actual fraud has been proved on the defendant, and circumstances of *suspicion* are not sufficient for the Court of Chancery to ground a decree upon; as to what is prayed by this Bill, the Court never gives *such* directions unless gross fraud is actually proved." We must inquire, then, and analysed: what was the prayer of the bill under consideration? and what the directions which the Court will not give unless gross fraud be actually proved? The defendant, in the suit then depending, had been plaintiff in a former cause, in which one *Hall*, an insolvent, and his assignees, were defendants, and in which an account had been decreed. On taking this account before the Master, *Lowfield* produced an acknowledgment from *Hall* of his debt. *Hall* made an affidavit, that this admission had been obtained from him by *Lowfield* without any consideration: but the credit of this affidavit was weakened by proof of payment of part to *Hall*. *Hall* died; and *Townsend*, as *Hall's* representative, brought his bill in aid of the account previously ordered; and, after charging fraud, in that the sum which the defendant claimed before the Master had never been actually paid to *Hall*, prayed that the defendant should be examined upon interrogatories, and be allowed no sums but what he should produce receipts for, or prove, by witnesses present at the time, to have been

The case of
Townsend v.
Lowfield stated:

(x) 2 P. Wms. 166.

Vindication of Lord Hardwicke's consistency, in declaring that fraud *may* be presumed; yet refusing to make the presumption, where the suspicious circumstances were, in some degree, rebutted; and where evidence, which might have cleared up the whole, had been lost by the act of God.

The rules of evidence in Equity.

been really advanced. Under these circumstances, the weight of *Hall's* testimony being much reduced, not merely by his own previous written admission, but by proof, *aliunde*, that a part, at least, of the monies had come to his hands; and his death, as well as that of several other witnesses, having deprived the defendant *Lowfield* of the benefit of their examination; Lord Hardwicke, although there were some suspicious appearances, would not presume fraud; and declared that the Court would not, *wantonly*, on presumption or influence, give such directions as the bill prayed. This decision by no means contradicts his Lordship's subsequent assertion, in *Chesterfield & Jansen*, before cited, that, "fraud *may* be presumed from circumstances." A refusal to make this presumption where a party has substantiated part of his defence by evidence, and where he is deprived, not by his own default but by the act of God (*y*), of the benefit of examinations which might, possibly, have had the effect of removing any remaining suspicions; affords neither authority nor sound argument against admitting, and acting upon, a presumption well corroborated, and the force of which is not weakened by rebutting circumstances. *Violenta presumptio* is, in many cases, according to Lord Coke, *plena probatio* (*z*): and the rules of evidence in Equity,

(*y*) In *Johnson v. Johnson*, decided on appeal in *Dom. Proc.* 18 Mar. 1727, this consideration was a material ingredient

in the reversal of Lord Lechmere's decree.

(*z*) 1 Instit. 6 b; and see *Baddeley v. Leapingwell*, Wilm. Notes, 237.

Equity, frequently, call upon the Judge to decide, taking all the *circumstances* together, not absolutely on which side the truth lies, but, that, it is highly and morally probable the truth is with one party, or witness, rather than the other (*a*). For, as Lord Hardwicke said on another occasion, there is no rule of evidence to be laid down, in the Court of Chancery, but a reasonable one; such as the nature of the thing to be proved will admit of (*b*).

In *Trenchard & Wanley* (*c*), Sir Joseph Jekyll, M. R. did, indeed, say, that, "the rule of law as to fraud is also a good rule in Equity; namely, that fraud is never to be presumed:" but to this, as to every other *dictum*, we must apply the universal axiom, that words are always to be understood *secundum subjectam materiam* (*d*), with reference to the occasion on which they are used. Now, in *Trenchard & Wanley*, the defendant, a goldsmith or banker, having money in his hands belonging to the plaintiff, was instructed by him to invest it in lottery orders, without any direction in whose name those lottery orders should be taken. *Wanley* took the orders in his own name, and afterwards subscribed them into the South Sea Stock, with other orders of his own and of his different customers to a large amount; but did not give notice of the transaction until

two

ty require only
reasonable proof

With what re-
strictions the dic-
tum in *Trenchard*
v. *Wanley* is to
be understood:

Analysis of
that case

(*a*) *East India Company v. Donald*, 9 Ves. 282. 3 Atk. 40; and see *Man v. Ward*, 2 Atk. 229.

(*b*) *Llewellyn v. Mackworth*, (c) 2 P. Wms. *ubi supra*.

(*d*) Fourth Rep. 13 b, 14 a.

two months had elapsed. The plaintiff, upon a failure of the bubble, brought his bill in Chancery, praying that the defendant might be ordered to replace the lottery orders which he had, without the consent of the plaintiff, subscribed into the South Sea Stock.

It was under these circumstances, that, Sir Joseph Jekyll said, "the confusion and hurry that goldsmiths, and other people, were then in, might account for the defendant's not giving notice, sooner than he did, of his having subscribed these orders into the South Sea Stock; and the question might be retorted upon the plaintiff—why did not he come sooner to redemand the orders?" His Honour further thought, that even if the plaintiff had forbidden the defendant to subscribe the orders, yet, if they were left in his hands, the express words of the act of Parliament (*e*), passed for that special purpose, would have justified the subscription; but here there was no prohibition on the *cestui que trust*. The reason, the learned Judge said, why the defendant took the orders in his own name, might be, that, he was always in the way to accept them; and there was no direction from the plaintiff to buy the orders in any other name: then, from the time the defendant took the orders in his own name, he became a trustee; and, being a trustee, the act of Parliament alone, without any authority from the party, empowered him to make this subscription; and the case was the stronger in that the defendant

(*e*) Stat. 6 Geo. 1, cap. 4, sec. 23.

ant subscribed other orders of his own, and only acted for the plaintiff as he did for himself. The general confidence of the nation at the time of making these subscriptions was, that it was a beneficial thing; so that nothing but fraud in this case could make the trustee answerable to his *cestui que trust*. Besides, a later act of Parliament (*f*), intended to quiet all matters, and to bind down and conclude the proprietors of South Sea Stock, gave them 33*l.* 6*s.* 8*d.* *per cent.* in satisfaction and full discharge of the monies paid on any subscriptions, notwithstanding any doubt or question touching the validity of the subscription in any wise.

It was with reference to these peculiar facts, that Sir Joseph Jekyll said, fraud was not to be presumed;—and so in a similar case, it is pretty certain any Judge in Equity would say at the present day:—but such a decision would by no means impugn the doctrine of Lord Hardwicke, that circumstances may justify the presumption of fraud. Sir Joseph Jekyll's words, as reported, are, no doubt, very general; but, even admitting they were as generally spoken, still, when the occasion on which they were delivered is taken into account, they will amount to no more than this—a Court of Equity will not wantonly presume fraud, where a more favorable inference can fairly be drawn; or, to use the words of Chief Justice Treby, in *Bath & Montague's* case (*g*), “will not convict any

As that case stood, the decision of *Trenchard v. Wanley* is by no means inconsistent with the doctrine of Lord Hardwicke, that, fraud may, under other circumstances, be presumed;

though such a presumption will never be made wantonly, or upon doubtful evidence.

(*f*) Stat. 7 Geo. 1, cap. 1, sec. 3. (*g*) 3 Cha. Ca. 85.

any man of fraud, where the evidence is doubtful." Lord Hardwicke's third division of the several species of frauds, neither overrules the *dicta* in *Townsend & Lowfield*, and in *Trenchard & Wanley*, nor is itself at all weakened as an authority by those cases; they may well stand together. And although other occasional *dicta*, not decisions, are reported (*h*), as having fallen from very high authority, against imputing fraud; their generality may, it is believed, admit, and require, qualification: when it has been said, that, "in a Court of Equity fraud must be clearly proved, not imputed;" it is apprehended the meaning must have been, not to exclude all inference of fraud from circumstances (*i*) short of *legal* proof; but, that the circumstances ought to be such as will amount to morally conclusive, though not direct and formal, evidence of *mala fides*: for instance, Lord Eldon's own judgment in *Fullagar v. Clark* (*k*), affords the best interpretation of the sense in which he used occasional expressions, ascribed to him; in that case, his Lordship declared "his opinion that the Court of Chancery would, as it ought, in many cases, order an instrument to be delivered up, as unduly obtained, that a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied though it may be strongly *presumed*;" His Lordship added, that both Lord Hardwicke and Lord Kenyon recognized the same distinction. And in the very case

Other occasional *dicta*, against the propriety of imputing fraud, examined:

those which have fallen from Lord Eldon best interpreted by his Lordship's own declarations on other occasions.

Lord Kenyon's authority concurrent with that of Lord Hardwicke.

(*h*) See *Walker v. Symonds*, 3 Swanst. 61.

(*i*) *Stileman v. Ashdown*, 2 Atk. 480.

(*k*) 18 Ves. 483.

case in which Lord Eldon observes "fraud must never be imputed unless clearly proved," he subsequently declares it "impossible not to infer, judicially, a fraudulent purpose (*l*)," from an act, which, under other circumstances, might well have been referred to erroneous judgment, or, at the worst, to carelessness.

It is certainly not from any wish to enter into competition with the feeble race of "word-catchers who live on syllables," that this point has been dwelt upon: but as the doubt and difficulty raised by them, would, unless removed once for all, be meeting us at sundry stages of our progress, it may be well to dispose of them. The whole discussion might, perhaps, have been avoided, if, in the reported judgments which have given rise to it, the word *inference* had always been cautiously used instead of the word *presumption*. The question is, indeed, rather one for a captious verbal critic than for a reasoning lawyer; and has, probably, arisen from a confusion between the distinct senses in which the word *presumption* may be used;—first, as implying belief, previously formed, without examination: secondly, as "an inference from circumstances, not affording rigid demonstration, but necessarily impressing a strong moral conviction (*m*)."
In the first sense, *presumption*

The doubts which have been raised as to the propriety of Lord Hardwicke's third division of frauds, turn rather upon verbal criticism than on legal principle; but the accuracy of his Lordship's language is strictly defensible;

(*l*) *Walker v. Symonds*, 3 Swanst. 71; and see *Taylor v. Jones*, 2 Atk. 602.

(*m*) Johnson, *ad vocem*; citing "the sagacious" Hooker. It may be added, that, Bishop

Butler, no mean authority, uses the word *presumption*, in the sense here attributed to it, no fewer than fifteen times in the first seven introductory pages to his admirable "Analogy."

and *presumption*, taking the word in the sense in which it was, properly, used, may afford good grounds for an equitable decision.

Distinction between those presumptions which, according to equitable doctrine, are admitted as a species of evidence; and positive presumptions of law.

Lord Hardwicke's arrangement of the several species of frauds in matters of contract cannot justly be impeached;

but this treatise, as embracing a wider scope, requires more numerous subdivisions.

sumption is, doubtless, quite as much at variance with the rules of equity, and of common sense, as with those of common law: in its other meaning, presumption, strongly corroborated and unrebutted, may, according to the authorities already cited, and those which will, hereafter, be quoted, afford admissible grounds for an equitable decision: *such* a presumption is, in the words of Lord Mansfield (n), "a species of *evidence*, which must have a ground to stand upon, something whence it is to arise," and which may be met by conflicting evidence or argument; "being thus distinguishable from a positive presumption of law, which admits no contradiction;" and in support of which no application of equitable doctrine is requisite (o).

On the whole, we may conclude, not merely that Lord Hardwicke's arrangement of the several species of fraud is not to be impeached, *because* it includes presumptive frauds; but that it would have been altogether deficient had it omitted them: and, if our present purpose were to treat of frauds *in matters of contract* only, we might, with confidence, adopt his Lordship's divisions of the subject. But the more extended nature of our plan, proposing to embrace every description of fraud cognizable in Equity, requires a classification under more numerous heads: and, in making the necessary subdivisions, one principal object will

After this observation, it would be mere pedantry to accumulate examples.

(n) *Goodtitle on dem. Brydges v. Duke of Chandos*, 2 Bur. 1072.

(o) *Bennett v. Musgrove*, 1 Ves. Senr. 52. See *post*, under the head of "Settlement, Conveyance, &c."

will be to consult the convenience of the practising lawyer, by so grouping the cases more immediately connected with, and illustrating, each other, as to facilitate reference (*p*).

(*p*) An acute friend of mine, who accidentally called in upon me whilst I was employed on this work, gave me this piece of advice;—"if you wish your book to be consulted, take care to render it *reading made easy*." I communicate the hint for the

benefit of my brethren; to me it came rather late, as my plan had been previously fixed, and too extensively acted upon to be changed. How far it might have been simplified the reader must judge.

CHAPTER II.

Frauds as between Solicitor and Client.

Transactions between Solicitor and Client jealously scrutinized.

A security for a gratuity taken by the former from the latter,

or even a formal conveyance, valid only as a security for actual advances:

although the relief be sought by a mere volunteer.

THE relation between Solicitor and Client, and the power which his situation gives the former over the latter, makes it impossible to be perfectly assured, whether, in their transactions, the client is a free agent, or under undue influence and imposition: a Court of Equity, therefore, will not let a solicitor take a security from his client, pending a suit, for a single shilling by way of gratuity; however reasonable this might be, in many cases (*a*). And if a solicitor obtain from a necessitous client a conveyance, it will be considered only as a security for what he has actually advanced (*b*): and this relief will be given, even in favor of those who claim under the grantor merely
as

(*a*) *Saunderson v. Glass*, 2 Atk. 297; *Bridgman v. Green*, Wilmot, 72; and see *infra*.

(*b*) *Plenderleath v. Fraser*, 3 Ves. & Bea. 175; *Proof v. Hines*, Ca. temp. Talbot, 116;

Vaughan v. Lloyd, cited 5 Ves. 48; *Wood v. Downes*, 18 Ves. 123; *Newman v. Payne*, 2 Ves. Jun. 202; *Lewes v. Morgan*, 5 Price, 140.

as volunteers (c): for, as a general proposition, Equity will not allow a solicitor to make a purchase from his client whilst the relation subsists (d). Even the fact, that a deed was prepared (without the intervention of any other person) by a solicitor who claims any sort of benefit under it, is alone sufficient to raise a suspicion of fraud (e): but not so decisive a fact as to admit no explanation (f).

A solicitor ought not to purchase from his client ;

or prepare a deed under which he claims any benefit.

At common law, a client cannot change his attorney without a Judge's order; and then the Court provides that the papers shall not be taken out of his hands, without rendering him justice by payment of his costs (g): and as a client, at law, cannot change his attorney without leave of the Court, there would be no mutuality if the attorney had an absolute discretion to relinquish the cause (h). But in Courts of Equity the rule, in both cases, is different; a solicitor may decline proceeding with a suit (i): or the client may, without any application to the Court, change his solicitor (k): whilst fraud, on either part, will be prevented

At law, a client cannot change his attorney, without a Judge's order;

nor can the attorney relinquish the cause:

In Equity the rule is different,

(c) *Falkner v. O'Brien*, 2 Ball & Beat. 221.

(d) *Montesquieu v. Sandys*, 18 Ves. 308, 313; *Bellem v. Russell*, 1 Ba. & Bea. 105.

(e) *Watt v. Grove*, 2 Sch. & Lef. 503; *Harris v. Tremenheere*, 15 Ves. 40, 41.

(f) *Paine v. Hall*, 18 Ves. 475; *Balch v. Symes*, 1 Turn. & Russ. 92.

(g) *Twort v. Dayrell*, 13 Ves. 196.

(h) *Cowell v. Simpson*, 16 Ves. 281; *Walmsley v. Booth*, 2 Atk. 27.

(i) *Commerell v. Poyntun*, 1 Swanst. 1.

(k) *Cresswell v. Byron*, 14 Ves. 272.

but a discharged solicitor may retain the client's papers, until his costs are paid ;

and a solicitor who refuses to proceed with a suit has no *lien* on the funds in Court ; and only a qualified *lien* on the papers in his hands :

he must allow their inspection,

and production when necessary.

As against his client, a solicitor has a *lien* upon all papers which come into his hands in the character of solicitor ;

prevented ; in one case, by allowing a discharged solicitor to retain the client's papers until his bill be paid ;—he is authorized to refuse either to part with the papers, or even leave them in the Master's Office, before his costs are tendered (*l*). On the other hand, if a solicitor refuse to proceed with a suit, he has no *lien* on the funds in Court for his costs (*m*) ; and his *lien* on the papers in his hands will be qualified, so as not to prevent the hearing of the cause (*n*) : he cannot, by virtue of his *lien*, prevent the King's subjects from receiving justice (*o*) : but must allow the solicitor who succeeds him, or any other duly appointed agent of the client, to inspect the client's deeds, papers, and writings in the cause, at all reasonable times, and on giving reasonable notice, and allow copies to be taken thereof ; and also, if necessary, produce such deeds, papers, and writings before the Master, as well as at the hearing of the cause.

A solicitor has a *lien* upon all papers which come into his hands, in the character of solicitor, although they do not come into his hands in the particular cause in which he makes a demand of costs ; or even although they were deposited for a particular purpose, but, after the failure of that purpose,

(*l*) *Ross v. Laughton*, 1 Ves. & Bea. 350.

(*m*) *Cresswell v. Byron*, *ubi supra*.

(*n*) *Merryweather v. Melish*, 13 Ves. 162 ; *Mayne v.*

Watts, 3 Swanst. 95 ; *O'Dea v. O'Dea*, 1 Sch. & Lef. 316.

(*o*) *Commerell v. Poyntun*, 1 Swanst. 2 ; *Moir v. Mudie*, 1 Sim. & Stu. 282.

purpose, or its completion, have been permitted to remain in his hands (*p*): for it may have been on the faith of the whole documents that he made the advances for his client. If, indeed, a tenant for life give deeds into an attorney's hands, the attorney has no *lien* on them for his costs *as against the remainder-man*; for that would be to enable a tenant for life to charge the remainder-man (*q*). And upon papers which he has obtained when acting in a different character, a solicitor can claim no *lien* for business done *as solicitor* (*r*). So a solicitor, by taking a security, abandons his *lien* (*s*): this has, indeed, been doubted by the Court of King's Bench (*t*); but Lord Eldon, expressly adverting to that doubt, upon a subsequent occasion firmly adhered to his original opinion (*u*). And it is quite clear, that a solicitor can have no *lien* upon his deceased client's will; for such a claim, if admitted, might operate a fraud upon the executor, and all persons claiming under the will (*w*). Nor can a solicitor refuse to produce a deed executed in his favor, in which deed a power of revocation is reserved: nor, upon the same principle, can he withhold from his client a will made by such client and deposited with him;

but not as against a remainder-man, when the client was only tenant for life of the property to which the papers relate:

nor can the *lien* be claimed upon papers obtained in a different character from that of solicitor: or where he has taken a distinct security.

And a *lien* upon the will of a deceased client cannot be maintained;

nor can a solicitor refuse to produce a revocable deed executed in his favor; or his client's will deposited with him; for the retention might embarrass the alteration of

for

(*p*) *Ex parte Pemberton*, 18 Ves. 282; *Ex parte Sterling*, 16 Ves. 258.

(*q*) *Ex parte Nesbitt*, 2 Sch. & Lef. 279; *Barnsley v. Powell*, Ambl. 102.

(*r*) *Champernorn v. Scott*, 6 Mad. 93.

(*s*) *Cowell v. Simpson*, 16 Ves. 275.

(*t*) *Stevenson v. Blakelock*, 1 Mau. & Sel. 544.

(*u*) *Balch v. Symes*, 1 Turn. & Russ. 92.

(*w*) *Georges v. Georges*, 18 Ves. 296.

those testamen-
tary dispositions
which ought to
be ambulatory
till death.

for it is essential to such an instrument that it may be altered even *in articulo mortis* (*x*); irrevocability would destroy its essence as a will (*y*); the most general of all maxims being, that *voluntas testatoris ambulatoria est usque ad mortem* (*z*); and it could only be with a view to the subversion of the axiom, that the retention of a will was attempted: if it did not operate to embarrass that testamentary disposition which, from its very nature, ought to be uncontrolled, the asserted *lien* in such a case could not have any operation at all.

By what acts
a solicitor waves
his *lien* on the
papers of a bank-
rupt client:

A solicitor will be held to have relinquished his *lien* on papers in his hands, belonging to a bankrupt under whose commission he has proved his debt (*a*). The case would be still stronger if he had actually signed the bankrupt's certificate; as, by so doing, he may have influenced others to sign; thereby affecting the interests of the whole body of creditors. Under such circumstances he must, clearly, abide by his proof; and deliver up any security, or property, on which he might have maintained a claim of *lien*, had he not estopped himself by his election, and the acts done by virtue of his proof (*b*). But, where a solicitor, instead of proving under a commission against his client, has preferred bringing an action for the amount of his bill; the solicitor's *lien*, upon all deeds

and in what case
the *lien* con-
tinues, as against
the assignees, to
the same extent
in which it would
have availed
against the
bankrupt.

(*x*) *Balch v. Symes, ubi supra.*

(*y*) *Hobson v. Blackburn*, 1 354.

Addams, 278.

(*z*) *Matthews v. Warner*, 4 & Jameson, 27.

Ves. 210.

(*a*) *Ex parte Hornby*, Buck,

(*b*) *Ex parte Solomon*, 1 Glyn

deeds and writings in his hands, may be maintained in respect of the costs of the action, as well as the original debt: unless it can be shewn, that, he improperly commenced the action for the sole purpose of increasing the costs for his own advantage. If nothing of this kind appear, the *lien* will be available against the assignees, to the same extent as it would against the bankrupt (c).

For, a Court of Equity will not be disposed to relax the doctrine of *lien*, where it is fairly applicable: the doctrine is, in fact, as advantageous to clients as to solicitors; for business is often transacted by solicitors for needy clients, merely on the prospect of obtaining their costs by means of such *lien* (d). How far the doctrine of set off may supersede, or interfere with, the doctrine of *lien*, is a question upon which the Courts of King's Bench and of Common Pleas have held different opinions: the decisions of the first named Court being more favourable to the solicitor (e); those of the latter to the parties claiming a set off (f). But, the practice of the Court of Chancery has always been, that, when, in any particular cause, comprising a number of questions, costs may ultimately be due to both parties, and sums to be paid as duties to each; there the demands of both shall be arranged, so as to do justice

The doctrine of *lien* not willingly relaxed,

it being as advantageous to clients as to solicitors.

How far the doctrine of set off clashes with that of *lien*;

The Court of Chancery, in arranging the demands of its suitors, does justice as between them, before it adverts to the *lien* of the solicitors, in that particular suit;

(c) *Lambert v. Buckmaster*, Barn. & Ald. 46; *Harrison v. 2 Barnw. & Cressw.* 618; *S. C.*, *Bainbridge*, 3 Dowl. & Ryl. 365.
2 Dowl. & Ryl. 128.

(d) *Ex parte Bryant*, 1 Mad. 52.

(f) *Browne v. Sayce*, 4 Taunt. 322; *Hall v. Ody*, 2

(e) *Holroyd v. Breare*, 4 Bos. & Pull. 29.

but does not allow the costs of different causes to be set off, in prejudice of the solicitor's *lien*.

In what cases a release of costs awarded, given by one party to the other, may oust the solicitor's *lien*.

An order on an unpaid solicitor to produce the client's papers, limited to their production in the existing suit;

unless the rights of third persons are concerned:

justice *between them*: and the *lien* of the solicitor is only as to those costs which, upon the whole, taken together, his client can claim from the other (*g*). It does not, however, by any means follow, that, the costs of *different* causes can be set off against each other, to the prejudice of the solicitor's *lien* (*h*). An attorney cannot set off his bill without having delivered it (*i*).

If a defendant be bound by an award to pay costs to the plaintiff; a release of all demands, given by the plaintiff to the defendant, will not, necessarily, oust the *lien* of the plaintiff's attorney upon the costs awarded: for the release may have been collusive (*k*). *A fortiori*, where no such release has been given, the *lien* may be made effectual, either at Law or in Equity (*l*). But, the case might be different where a good consideration for the release was proved (*m*).

An order upon a solicitor, whose services are discontinued, and whose bill is unpaid, for production of his client's papers, will, as far as the client only is concerned, be limited to their production in the existing suit; not extended to their production in any other matter (*n*): but, though a solicitor may have a *lien* on a deed for his costs, yet

(*g*) *Taylor v. Popham*, 15 Ves. 75, 79; *Ex parte Rhodes*, 15 Ves. 541.

(*h*) *Wright v. Mudie*, 1 Sim. & Stu. 267; *Smith v. Brocklesby*, 1 Anstr. 61; *Gabbit v. Chaytor*, 1 Anstr. 279.

(*i*) *Murphy v. Cunningham*, 1 Anstr. 198.

(*k*) *Gifford v. Gifford*, Forrest's Exch. Rep. 110.

(*l*) — *v. Bolton*, 18 Ves. 292.

(*m*) *Owen's Case*, 2 Ves. Sen. 26.

(*n*) *Ross v. Laughton*, 1 Ves. & Bea. 350.

yet if his client be bound to produce it for the benefit of a third person, so must the solicitor; or those claiming through him (*o*): the *lien* is only as between him and his client; and must not interfere with the rights of other persons (*p*): otherwise, where there was a decree for a sale, or account, there might be collusion between the client and solicitor, to lay an embargo upon the title deeds, and thereby prevent the sale of estates; or upon papers, and thereby defeat the taking of accounts; which would, in fact, be making the solicitor more powerful than the Court. When, therefore, there are persons who have right antecedent to that of the solicitor, he cannot, as against them, justify a detainer of the papers: if he could, a heavier charge might be laid upon the deeds than the estate was worth; and the real owner might have to pay for transactions to which he was an utter stranger; or which may even have been in direct hostility to his interests (*q*).

without this qualification, the general rule would leave an opening to collusion;

and, in some cases, shift the burthen of costs upon those who ought not to be saddled with them.

If a solicitor die, during the progress of a cause, his personal representative cannot be compelled to deliver the papers in the cause to another solicitor,

The *lien* of a deceased solicitor survives to his personal representative.

(*o*) *Ex parte Moule*, 5 Mad. 465; *Fenwick v. Reed*, 1 Meriv. 122, 126: but in collateral cases, the mode of proceeding is, not by applying for an order, but, by serving a *subpoena duces tecum*, as in the case of any other witness in possession of a deed;

Busk v. Lawis, 6 Mad. 29; *Brassington v. Brassington*, 1 Sim. & Stu. 454.

(*p*) *Furlong v. Howard*, 2 Sch. & Lef. 115.

(*q*) *Marsh v. Bathoe*, Ridgw. Ca. in Cha. temp. Hardwicke, 256.

licitor, before security be given for the discharge of the *lien* thereon (*r*).

Extent of solicitor's *lien*,

who will be protected against a fraudulent compromise between his client and the opposite party.

Bill for agency may be taxed, on the application of the attorney immediately employed, but not of the client.

A solicitor's *lien* does not extend to general debts; but only to those due to him in his professional character (*s*): and his *lien* on a fund recovered in a cause, attaches only in respect of costs incurred in such cause (*t*). If, after money has been paid into Court, the parties settle the matter in debate, and the plaintiff seeks, without the knowledge of the solicitor on the other side, to have the bill dismissed and the money paid out of Court; on the application of the solicitor for the defendant, part of the money will be ordered to be attached to answer his bill of fees and disbursements (*u*): for a client will not be allowed to cheat his attorney, by entering into a collusive settlement behind his back (*w*). The solicitor in a cause may, it seems, move to have his own agent's bill taxed (*x*); although this point appears, in more than one instance, to have been decided differently (*y*): an application, however, by the client, to have the bill of costs of the agent employed

(*r*) *Magrath v. Lord Muskerry*, 1 Ridgw. Ca. in Parl. 476; *Redfearn v. Somerby*, 1 Swanst. 84.

(*s*) *Worrall v. Johnson*, 2 Jac. & Walk. 218.

(*t*) *Lann v. Church*, 4 Mad. 392.

(*u*) *Fairland v. Enever*, 1 Dick. 114.

(*w*) *Cole v. Bennett*, 6 Price,

18; and see *Brookes v. Bourne*, 1 Price, 73; *Pope v. Wood*, 2 Anstr. 578; *Gifford v. Gifford*, Forrest's Exch. Rep. 110.

(*x*) *Corner v. Hake*, 2 Cox, 173; *Ex parte Bearcroft*, 1 Dougl. 200, note; *Paget v. Nicholson*, 1 Dick. 285.

(*y*) *Anonym.* 1 Wils. 266; *Binstead v. Barefoot*, 1 Dick.

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ployed by his solicitor taxed, will be unsuccessful (z). A town agent may be entitled to a *lien* upon money recovered in a suit, for expenses incurred by him in the prosecution of that particular suit; but he can maintain no *lien* upon such money, the property of the suitor, for the general balance due to him by the country attorney, whose agent he is (a). The town agent may obtain an order, that the suitor shall not pay the country solicitor's bill, without the consent of the town agent (b); and, to that extent, though he cannot intervene with his claim of *lien* as against the client directly, he may do so as against the solicitor employed by him: in Equity, before the papers are taken from him, he has at least a right to the money due to him in respect of that cause (c). A client cannot be compelled to pay over again, to the clerk in Court, costs which he has once paid to the solicitor; the clerk in Court, however, will not be ordered to deliver up any papers which have come to his hands in the course of the cause (d). And, where the client has not paid the costs to his solicitor, it seems, that, the clerk in Court may, in Equity, pray payment of his bill of costs, either against the solicitor, or the client; though he could not proceed at Law against the client, for want of a retainer (e).

The *lien* of a town agent, how limited;

and to what extent made available;

Rules as to the *lien* of a clerk in Court.

It

(z) *Wildbore v. Bryan*, 8 Price, 680.

(a) *Moody v. Spencer*, 2 Dowl. & Ryl. 7.

(b) *Ward v. Hepple*, 15 Ves. 298.

(c) *Ex parte Steele*, 16 Ves. 164; *Farewell v. Coker*, 2 P.

Wms. 460; *Bray v. Hine*, 6 Price, 210.

(d) Last cited case.

(e) *Anonym. Mosely*, 172.

In what cases a solicitor has been allowed to conduct a suit against parties who have previously been his clients;

Objection to the practice ;

discountenanced by Lord Eldon.

It has been held, that, a solicitor who has, to a limited extent only, been employed by all the defendants in an amicable suit in Chancery, will not, (in case disputes between the parties in that suit should subsequently arise,) be prevented from acting as solicitor in any other suit against some of his former clients: provided it do not appear, that any important confidential matter has been disclosed to him, the knowledge of which he might unfairly use to the prejudice of his original employers (*f*). This decision, however, is open to one strong objection; it does not rest upon a general principle, but on particular circumstances; which it may be impossible to rebut, without making that discovery, which it may be the very object of the former client to avoid, and which his application, in its nature, protests against (*g*); Lord Eldon has said, that, he recollected many instances, both as to counsel and attornies, in which it was extremely difficult for a man to hold, he could with propriety be employed in both causes; and with regard to that, *quod dubitas ne feceris*, is a good rule for the regulation of conduct. His Lordship added, that, he did not recollect an instance of a solicitor changing his situation from the plaintiff: and a case might easily be put, that a most honest man, so changing his situation, might communicate a fact, appearing to have no connexion with the case, and yet the whole title of his former client might depend upon it.

(*f*) *Robinson v. Mullett*, 4 Price, 354.

(*g*) *Cholmondeley v. Clinton*, Coop. 86.

it. It may be doubted whether, as against a client who, having employed solicitors in partnership, has a right to their united exertions, the solicitors are at liberty to dissolve their partnership, and turn the client over to one of them, (it should seem they have *not*, as against him, the power of dissolving their partnership (*h*);) but, however that may be, a retiring partner can never be considered as a discharged solicitor. The client after such dissolution of partnership cannot employ both; and it would be impossible to maintain, that, if he employ one, the other is let loose, and discharged from all those obligations which he had undertaken. A solicitor under such circumstances, if retained against his former client, must (however high his personal character,) be considered, hypothetically, as employed for no other reason except the very improper one, that he had been previously employed by the other party; and, upon the clearest general principle, that cannot be admitted (*i*).

When a client has employed two or more partners as his solicitors, should the partnership be dissolved, no retiring partner can be permitted to act professionally against his former client.

Professional men must be strictly held to such accuracy as to give security to their employers; and although they are not excluded from the reasonable protection which fair principles of presumption and prescription may afford, yet, the circumstances of each case must be considered; and a law agent, continuing to act for his client, may, after a lapse of many years, be made responsible for a loss occasioned by his neglect, although the

Law agents are not excluded from setting up lapse of time as a defence; but the circumstances of the case will be closely investigated.

(*h*) *Cook v. Rhodes*, in note to 19 Ves. 273.

(*i*) *Cholmondeley v. Clinton*, 19 Ves. 267, 273, 275.

the client, being an embarrassed man, made no remonstrance, notwithstanding he was aware of the transaction; and even after a settlement of accounts with his representatives, and a discharge given by them, provided it was so given before they discovered the facts (*k*).

Solicitor must not serve his client by unfair means:

he may be called on to make good, to a purchaser from his client, the injuries arising from fraudulent concealment, or misrepresentation, on his part.

A solicitor must not take upon himself to omit any covenant originally agreed upon:

A solicitor must cautiously avoid letting his zeal for his client carry him so far as to lead him to assist such client in an act of injustice (*l*); or to give false intimation respecting a cause to the opposite party (*m*). A solicitor employed in transacting the sale of an estate, who, knowing of incumbrances thereon, treats on behalf of his client for the sale, without disclosing the incumbrances to the purchaser, (knowing him to be a stranger thereto,) but makes such a representation as induces the buyer to trust his money on the security; may, in Equity, be liable to make satisfaction for any injury sustained in consequence of his fraudulent concealment and misrepresentation (*n*): And where, upon a contract of sale, a draft of a conveyance has been prepared by the agent of one party, the solicitor of the other party must not take upon himself to omit, in the ingrossment of the conveyance, any one of the covenants contained in the original draft, without communicating such omission to the agent

(*k*) *Macdonald v. Macdonald*, 1 Bligh, 336.

(*l*) *Bowles v. Stewart*, 1 Sch. & Lef. 227; *Ex parte Stokes*, 7 Ves. 407.

(*m*) *Kimpton v. Eve*, 2 Ves. & Bea. 352.

(*n*) *Arnot v. Biscoe*, 1 Ves. Senr. 95.

agent on the other side. Whether the covenant was, in point of conveyancing skill, properly struck out, or not, will be immaterial; the departure from the correct line of professional conduct will, at least, be visited by the infliction of the costs incurred in setting that right (*o*). If an attorney, through mere negligence, cause his client to accept a bad security, such *laches* may subject the attorney to damages at law: if the transaction be mixed up with fraud as well as negligence, relief may properly be sought in Equity (*p*). If a solicitor prepare a fraudulent deed, which he has the means of knowing to be such, it will be no sufficient excuse for him, to say—he merely followed his instructions: and if the deed contain any thing for his own benefit, this additional circumstance will make it quite clear that he ought to pay the costs of any suit necessary to set aside such fraudulent deed (*q*); as well as be disabled from holding any benefit which he has bargained for, as the price of his assistance in the fraudulent transaction (*r*).

he is answerable for gross negligence;

and he will subject himself to the costs of setting aside any fraudulent deed, though prepared in pursuance of instructions; as well as be disabled from holding any consequential benefit to himself.

Should a solicitor advise a bill to be filed for the administration of the assets of a testator, whose sole executor he himself is; and continue to act as the solicitor of the plaintiffs in such suit; but, abusing

Abuse of confidence in a solicitor, by advising a suit for his own ends; and, when instituted, conducting it in

(*o*) *Staines v. Morris*, 1 Ves. & Bea. 15: see *Rob v. Butternick*, 2 Price, 197.

(*p*) *Brooks v. Day*, 2 Dick. 572: and gross negligence may subject a solicitor to summary punishment by attachment, in

Equity as well as at Law; *Lloyd v. Nangle*, 1 Dick. 129. See *post*, p. 44.

(*q*) *Bennett v. Vade*, 2 Atk. 327.

(*r*) *Phayre v. Perce*, 3 Dow. 127, 130.

fraudulent perversion of the practice of the Court.

abusing the confidence reposed in him, neglect, for an unreasonable length of time, to put in his answer to the bill filed upon his recommendation: such conduct will be strong evidence of a scheme to retain in his own hands the personal estate of his testator. A Court of Equity will not permit such a gross abuse of its practice; and, on motion, the party will be ordered to put in answer within a week, or stand committed (*s*).

What authority to act a solicitor ought to require;

A solicitor must have a special authority to institute, although a general authority be sufficient to enable him to defend, a suit: and the solicitor can only secure himself from the risk of having to pay all expenses incurred, by having a written authority (*t*): for if a man were allowed to introduce another's name upon the record without clear authority, combinations might be formed for the most fraudulent purposes (*u*); and if any such attempt appear, the solicitor may be proceeded against as for a misdemeanour (*w*). But if a plaintiff's name, used without authority, stand upon the record down to the hearing, although without his knowledge, he must pay costs, if the bill be dismissed with costs; for the defendants would be as free from blame as himself: he will, however, have his remedy over, against the solicitor; who will be ordered to reimburse him, not merely taxed, but, full costs (*x*). Where a solicitor has

fraudulently to introduce a name upon the record, a misdemeanour.

A plaintiff, whose name has been used without authority, may be ordered to pay costs to the defendants;

but will have his remedy over, against the solicitor.

A person nam-

(*s*) *Mootham v. Hale*, 3 Ves. & Bea. 92.

(*t*) *Wright v. Castle*, 3 Mer. 12.

(*u*) *Dundas v. Dutens*, 1 Ves. Jun. 200.

(*w*) *Ex parte Stuckey*, 2 Cox, 284.

(*x*) *Dundas v. Dutens*, *ubi supra*; *Wade v. Stanley*, 1 Jac. & Walk. 675. See *infra*.

has instituted a suit on behalf of an infant, and named a *prochein amy*, without obtaining his consent; if, on a reference to the Master the suit is dismissed, as not being for the infant's benefit; the costs must be paid by the party who appears on the record as the *prochein amy*, and who, in that stage of the suit, must be considered as such; he must make a direct application against the solicitor, if he acted improperly (*y*). If a person who is made a co-plaintiff without authority will acquiesce in it, and lie by for a length of time before he makes any application to the Court, his name ought not, then, to be struck out; as it might tend to derange a cause, in other respects properly instituted, and impede the hearing: the order, therefore, will be, that the solicitor should indemnify the party, whose name has been improperly used, both as to his own costs, and, also, as to any costs which may be recovered by the defendants (*z*).

ed without his consent as the *prochein amy* of an infant, liable to costs, if, on reference to the Master, the bill is dismissed;

but may have relief over.

In what cases of *laches*, a suit-or's name, used without authority, will not be struck out; but the solicitor ordered to give him an indemnity.

It is clear, that, at Law, an attorney may bind his principal by submission to an award, by rule of *Nisi Prius* (*a*): and even when the attorney has done so without authority, the client's only remedy is by action against his attorney (*b*). But, whether solicitors have the same power of binding their principals in Courts of Equity is questionable:

At Law, an attorney may bind his principal, by submission to an award;

quare, whether the same rule prevails in Equity?

(*y*) *Whittaker v. Marlar*, 1 Cox, 286. 679; *Rex v. Addington*, Sayer, 259.

(*z*) *Titterton v. Osborne*, 1 Dick. 351; *Wilson v. Wilson*, 1 Jac. & Walk. 458, 459. (*b*) *Filmerv. Delber*, 3 Taunt. 486; *Barker v. Braham*, 3 Wils. 374, 378; and see *Du-*

(*a*) *Bacon v. Dubary*, Skin. *vall v. Terry*, Show. P. C. 16.

able: in an early case, it was said, that, although the consent of solicitors shall bind their clients in interlocutory orders, yet it shall not bind in orders of award for final determination: however, it was, in the same case, resolved, that, the solicitor should not pay costs for his assent; the Court having, by its order, shewn its opinion that the matter was proper for reference (c). If an attorney enter into an undertaking, on behalf of his client, without due authority, this is a fraud; and the attorney must himself make good his undertaking: but, if he had authority to make the engagement, no personal responsibility attaches to him, and the client, alone, is bound by the engagement (d).

In what cases an attorney becomes personally responsible, by giving an undertaking on behalf of his client.

Solicitor only answerable for such negligence as affords inference of fraud.

Duties of a solicitor to a commission of bankrupt;

An attorney who has put out his client's money on defective security, will not be compelled to make good the loss, even (it seems,) although he might, by diligent inquiry, have ascertained the state of the title; unless he has been guilty of such gross negligence as amounts to fraud (e).

If a creditor of a bankrupt be appointed solicitor to the commission, he is as much bound to protect the estate against his own demands as against those of any other person: and where one partner is the petitioning creditor, another an acting commissioner, another the solicitor to the commission, and the remaining one the sole assignee,

(c) *Colwell v. Child*, 2 Freem. 154; S. C. 1 Ch. Ca. 86.

(d) *Johnson v. Ogilby*, 3 P. Wms. 278.

(e) *Luke v. Bridges & Christy*, Prec. in Cha. 149; S. C. on appeal, Colles, P. C. 140: see *ante*, p. 41.

nee, there is such an opportunity for fraudulent collusion that the commission will not be allowed to stand (*f*). By the thirteenth section of the consolidated bankrupt act, it is enacted, that, the petitioning creditor shall prosecute a commission at his own cost, up to the choice of assignees, and be reimbursed out of the first money, got in under the commission: and, all fees or disbursements of any solicitor or attorney employed under any commission, shall be settled by the commissioners; provided such bills do not contain any charge respecting any action at Law or suit in Equity, in which case the same is to be settled by the proper officer of the Court in which the business contained in such bill, or the greatest part in amount and value thereof, shall have been transacted: and the same so settled shall be paid by the assignees to such solicitor or attorney, provided that any creditor who shall have proved to the amount of 20% or upwards, if he be dissatisfied with such settlement by the commissioners, may have the same settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings. But, although the latter part of the section, applies, generally, to *all* fees or disbursements by a solicitor employed *under a commission*, it seems not entirely to set at rest the doubt, very recently entertained (*g*), whether a solicitor

The fees and disbursements of a solicitor under a commission are to be paid by the assignees: how they are to be taxed: but, *quære*, whether the attorney's demand for business done up to the choice of assignees must not be made, exclusively, upon the petitioning creditor?

(*f*) *Ex parte Story*, Buck, 74; see, under the proper head, that, a person who, acts as solicitor under a commission of

Lunacy cannot be appointed receiver of the estate.

(*g*) *Ex parte Haynes*, 1 Glyn & Jameson, 36: and see *Ex*

solicitor could be allowed to present a petition, that the *assignees may* be ordered to pay his bill of costs, up to the choice of such assignees, as taxed by the commissioners: or whether his demand is not exclusively against the petitioning creditors for business done up to that time. However, though it appears not to be clearly settled, whether a solicitor's bill of costs, up to the choice of assignees, is to be paid to the petitioning creditor, and by him handed over to the solicitor; or whether the solicitor is at liberty, instead of making a personal demand upon the petitioning creditor, to apply to the Court for an order upon the assignees to pay his bill, up to that period; it is at least certain, that the assignees must pay the bill to one party or the other, out of the first monies received under the commission: and it has been declared to be not of course to refer to the Master, a bill for such preliminary business, which has been taxed by the commissioners; but particular objections ought to be stated. If, indeed, the solicitor, by refusing a copy of his bill to the creditor applying for the reference, renders it impracticable for him to state specific objections to particular charges, the order of reference will, on that ground, be made (*h*): and, with respect to creditors for more than 20 $\frac{1}{2}$ l., their right to such reference, without stating any particular grounds, is recognized by the above cited section of the statute of 5 Geo. 4, c. 98.

When a bill for such *preliminary* business has been taxed by the commissioners it has been held not of course to refer it to the Master.

When

parte Hartop, 9 Ves. 159; (*h*) *Ex parte Sutton*, 4 Mad. 395; *Ex parte Johnson*, 1 Glyn & Jameson, 24. *Ex parte Brereton*, 4 Mad. 479.

When a commission of bankruptcy is taken out, which has its foundation in nothing but fiction and fraud; a solicitor cannot more pointedly shew that he forgets his duty, than by lending himself to such a fraudulent purpose. The Court expects a reasonable degree of diligent inquiry by the solicitor, whether there is a petitioning creditor's debt, and an act of bankruptcy; but the object of preventing fraud will not be carried to such a degree of strictness as would raise difficulties against a solicitor, fairly endeavouring to satisfy himself whether, though doubts appear, they may not be overcome. Where fraud, however, or mischievous negligence, in suing out a commission, are established against a solicitor, he may be made to pay the costs of the proceedings (i). With respect to the messenger employed in working a commission of bankruptcy, (it has been determined at Law), the solicitor is not, in general, to be considered as a principal, responsible for payment of the messenger's charges. The messenger, it was said, must be aware he is not the principal; and may, upon the opening of the commission, ascertain who is the petitioning creditor: and the mere fact that the solicitor is the medium through which it is convenient for the messenger to receive his fees, will not make him a principal (j). Lord Erskine seems to have thought differently; but his

A solicitor must not lend his aid to a commission of bankrupt which is palpably fictitious.

Whether the solicitor is personally responsible for the fees of the messenger employed in working a commission.

(i) *Ex parte Arrowsmith*, 14 Ves. 210; *Ex parte Heywood*, 13 Ves. 69. (j) *Hartop v. Juckes*, 2 Mau. & Sel. 439.

If a solicitor bring an action for taxed costs, without deducting the costs of taxation when he is liable thereto, his action will be stayed.

If the assignees neglect to tax a solicitor's bill of costs,

a creditor may petition for that purpose:

if the bill be high, it is of course to refer it for taxation,

his Lordship was not called upon to decide the general question, as, in the case before him, the messenger had done acts distinctly recognizing the petitioning creditor as the principal on whose behalf he was employed (*k*). On the other hand, it was not doubted, in the case at Law just cited, that, by special agreement, the solicitor may make himself personally liable. When, after an order made in bankruptcy referring a solicitor's bill to be taxed, reserving the costs of taxation, the costs are taxed, and more than one sixth of the bill delivered is taken off; if an action be brought by the solicitor for the amount of the taxed costs, not deducting the costs of the taxation, the action will be stayed: and it will be referred to the Master to tax the costs of the taxation of the bill delivered, and deduct the same from the amount of the taxed costs; which costs, after such deduction, will be ordered to be paid to the solicitor (*l*). Should the assignees be guilty of a clear dereliction of their duty, in neglecting to tax the bill of costs of the solicitor employed in working the commission; a creditor may present a petition for that purpose, taking care to serve the assignees with the petition (*m*). Where a solicitor's bill of costs incurred in the prosecution of a commission is very high, it is quite of course to refer it for taxation, although no specific *item* of improper charge is pointed out:

(*k*) *Ex parte Hartop*, 12 Ves. 353.

(*l*) *Ex parte Bellot*, 4 Mad.

380; and see *Ex parte Westall*, 3 Ves. & Bea. 141.

(*m*) *Ex parte Walker*, 1 Glyn & Jameson, 95.

out (*n*): and this may be done even after payment, and the death of the assignee who paid it (*o*). In order to prevent improper petitions in bankruptcy from being presented, and to enable the Chancellor to make the solicitor, where the case calls for it, pay the costs of such petition; a General Order (*p*) has been issued, directing every attorney, who acts for a petitioner, to sign his name to the petition. Of course, the solicitor is not to be answerable for the success of every petition; for the facts may be misrepresented to him, and the law may not be obvious: but the Order is directed against solicitors who present unfounded petitions with fraudulent or interested views (*q*).

even after payment.

Order in bankruptcy affecting solicitors who act for petitioners.

An agreement between the solicitors of parties, who have submitted their claims to reference, that, the arbitrators shall have no instructions in writing, is very like a fraud, upon which relief might be had even at common Law. But the fact, that, the award was prepared by the solicitor for one of the parties, though indelicate, is no ground, by itself, for setting aside the award (*r*). For, though Lord Eldon has declared, that, a general rule, forbidding a solicitor, by himself or his partner, to be employed on both sides, would be extremely beneficial; and that many instances of great abuse

Improper management of a reference by the agreement of the solicitors for the several parties.

Not strictly correct, that the award should be prepared by the solicitor on either side; nor that, in any cause, the same solicitor should be employed for all parties; but the practice not absolutely prohibited:

(*n*) *Ex parte Emery*, Buck, 422.

(*o*) *Ex parte Neale*, Buck, 111.

(*p*) Dated the 12th of Aug. 1809.

(*q*) *Ex parte Cuthbert*, 1 Mad. 79; and see *Ex parte Stokes*, 7 Ves. 407.

(*r*) *Fetherstone v. Cooper*, 9 Ves. 68.

have arisen from the contrary practice ; still it has not been thought convenient, upon the whole, to put an end to that practice. And the reasons for its continuance are strong ; for if every creditor, or legatee, were bound to employ a different solicitor, the costs would tear the estate to pieces (s).

but if the confidence be abused, Equity will give relief.

It is, however, very clear, that, whenever a person entrusted to act as attorney for all parties, abuses the confidence placed in him ; this is a fraud which gives ample ground for the interference of Equity (t).

What bills of a solicitor are subject to taxation by the Master ; and what bills are not.

The costs of a solicitor for attending the House of Lords, in a *cause*, are, of course, subject to taxation : but there is a great difference between this, and soliciting an Act of Parliament, which business may be done by any one. A bill, where no business has been done in any *cause*, is not subject to taxation in Courts of Equity : for, there is no criterion by which their officer can be enabled to tax such costs ; or any means to which he might resort for assistance (u). The same reason applies to the taxation of costs of proceedings under a Commission of Review of a sentence of the Court of Delegates ; the application for such a commission is made, not to the Lord Chancellor, but, to His Majesty in Council, and though, by an order of council, the matter is referred to the Lord Chancellor, still the Court of Chancery

(s) *Dyott v. Anderton*, 3 Ves. & Bea. 178.

(u) *Ex parte Wheeler*, 3 Ves. & Bea. 22 ; *Williams v.*

(t) *Costigan v. Hastler*, 2 Sch. & Lef. 165 : and see *ante*, p. 41.

Odell, 4 Pr. 281.

Chancery has no officer to tax the costs of such a proceeding (v). On similar principles, a solicitor's bill for business done, in the affairs of a charity of royal foundation, before the Lord Chancellor, as exercising the visitatorial power, is not within the statute for taxing bills of costs; for such proceedings are not before the Chancellor as exercising his equitable jurisdiction; but, in his personal capacity, as the ministerial officer of the Crown (w). And, with respect to a solicitor's bill for business done in the Court of Great Sessions in Wales, where nothing beyond costs is in dispute, the bill cannot be directed to be taxed by a Court of Equity. But, where business in the Court of Great Sessions has been done by a solicitor, who refuses to deliver up the deeds and papers in his possession; there, as a Court of Equity clearly has jurisdiction to order him to deliver up the deeds and papers, taxation is, for the solicitor's sake, consequent upon such order. To do justice between the parties, it is necessary, that the solicitor's *lien* for costs should be discharged, before the papers are taken out of his hands; and, to ascertain the amount of such *lien*, taxation is requisite (x).

The general rule adopted by Courts for their guidance in exercising summary jurisdiction over their officers, seems to be this; where an attorney is employed in a matter wholly unconnected with

The principle by which Courts are guided, in exercising, or refusing to exercise, summary jurisdiction over their officers:

(v) *Ex parte Fearon*, 5 Ves. 647.

(x) *Ex parte Partridge*, 2 Meriv. 501; *Ex parte the*

(w) *Ex parte Dan*, 9 Ves. 548. *Earl of Uzbridge*, 6 Ves. 425.

and the usual
course as to di-
recting taxation.

his professional character, no summary interference will be exercised. But, where the employment is so connected with his professional character, as to afford a presumption that such character formed the ground of his employment by the client, there Courts will exercise a summary jurisdiction over their own officers (*y*). And the usual course, in Courts of Law as well as in Equity, is to order the whole of a solicitor's bill to be taxed, when any part of it concerns business done in that Court to which the application is made; and it makes no difference whether part of it was done on behalf of several other persons, as well as the party applying (*z*): but items for agency business can only be taxed on the application of the attorney immediately employed; not, as we have seen, at the suit of the client in the cause (*a*).

A settlement, and even long acquiescence, no positive bar to a subsequent examination of accounts between solicitor and client;

if such settlement took place, and such acqui-

Accounts between solicitor and client stand upon different grounds from those between unconnected parties (*b*): that which between others would be a conclusive settlement, is not so between them; settlement, and payment, of a bill, even though a long subsequent period may have elapsed, is not conclusive against an examination of the fairness of the demand. If the settlement was made during the pendency of the suit, the client

(*y*) In the matter of *Aikin*, 4 Barn. & Ald. 49.

(*z*) *Margerum v. Sandiford*, 3 Br. 234; *Hill v. Humphries*, 2 Bos. & Pull. 345: and see *post*, p. 55.

(*a*) *Wildbore v. Bryan*, 8 Price, 680.

(*b*) *Walmsley v. Booth*, 2 Atk. 29; *Newman v. Payne*, 2 Ves. Jun. 201; *Saunderson v. Glass*, 2 Atk. 297.

client must have been, in some measure, under the management and control of his solicitor; and may have felt it difficult to extricate himself from one possessing a knowledge of his whole case: a settlement under such circumstances does not bar taxation (c). escence lasted, whilst the client was in any degree under the control of the solicitor.

The statute of 2 Geo. 2, c. 23, s. 23, restrains an attorney from bringing any action for costs, until his bill has been delivered a month: but all his remedies, not specially taken away by the act, remain just as before; and he may take out a commission of bankruptcy without delivering his bill. Notwithstanding the statute, an attorney may take out a commission of bankruptcy, founded on his demand for business done, before he has delivered his bill. It is true, a commission cannot be taken out upon an equitable debt; but an attorney's demand in respect of business done by him, is in its nature a legal debt; though the directions of the statute may not have been satisfied, so as to support an action. There may be a hardship in permitting an attorney to take out a commission upon a demand which may be reduced by taxation: but in many cases there might be great hardship upon him, if this remedy were restrained; which, at all events, it is not by the statute, and, therefore, it remains open to him (d).

On a reference to the Master to tax a solicitor's bill of costs, the Court has, by virtue of the statute (e), a discretion to charge the solicitor with the costs of the reference, even if the taxed bill Costs of taxation under the statute:

(c) *Crossley v. Parker*, 1 Jac. & Walk. 462; *Aubrey v. Popkin*, 1 Dick. 404; *Langstaffe v. Taylor*, 14 Ves. 263; *Lewes v. Morgan*, 5 Price, 56: *see post*, p. 56, 57. (d) *Ex parte Sutton*, 11 Ves. 164; *Anonym. Mosely*, 31. (e) Stat. 2 Geo. 2, c. 23, s. 23.

bill shall not be less by one sixth than the bill delivered; where the bill is reduced a sixth part, the statute is imperative that the costs of taxation must be borne by the solicitor (*f*). Even when the Court does not think fit to refuse him the costs of taxation; if any attendant proceedings, creating useless expence, have been introduced by the solicitor, he will be ordered to pay such part of the costs thereby created as may appear reasonable (*g*). And where a solicitor has been guilty of great delay in giving in his bills, the Court has refused him the costs of taxation, though less than one sixth has been taken off (*h*): or made him pay the costs of the reference, when he has neglected, for an unreasonable time, to act upon it; and the bills have been lost in the Master's office (*i*). Although a very small proportion only of a bill, as given in to the Master, may be taken off; yet, if the bill, as first delivered to the client, contained an item of such a nature that the attorney thought prudent to omit it, in the account finally brought in; without imputing fraud to the attorney, the delivery of such a different bill will be held to have justified suspicion in the mind of the client, whose application for a taxation, under such circumstances, will not be punished with costs (*j*).

It

(*f*) There must be some mistake in the report of *Yea v. Yea*, 2 Anstr. 494; which ascribes to the Court a discretion, only in the very case in which none is given by the statute.

(*g*) *Yea v. Frere*, 14 Ves. 155.

(*h*) *Yea v. Yea*, 2 Anstr. 589.

(*i*) *Yea v. Yea*, 2 Anstr. 495.

(*j*) *Webb v. Stone*, 1 Anstr. 260.

It should be understood, also, that, independently of the statute, Courts of Equity have, under their general jurisdiction, authority to refer bills of costs for taxation, upon motion by a party in the cause in which the costs were incurred; and it will make no difference, though the bill include charges for business in other matters (*k*): the same principle is adopted in bankruptcy (*l*). And a Crown solicitor may not only be ordered to pay the costs of taxing his bill, but, when he has retained the whole amount of such bill, as delivered, out of sums paid to him on account, he may be ordered to pay interest for the balance, reported by the Master to be due from him, in consequence of the disallowance of the sums taxed off: for a solicitor who, from his office, is called upon to enforce the rights of the Crown, should understand that he has the further duty cast upon him—of a due regard for the rights and interests of the subject: he will, also, be equally responsible for the conduct of those employed by him, as for his own conduct; and it will be quite immaterial whether he has, or has not, made any interest of the balance improperly retained in his hands (*m*). An attorney, like any other person, may take a mortgage, *ab ante*, for money advanced and to be advanced; but he cannot take such a security from his client for the payment of future bills

and independent-ly thereof, by virtue of the general jurisdiction of Equity.

A Crown solicitor's bill may be taxed, and he may be charged, not only with the costs of taxation, but, with interest upon any sum retained by him, beyond the amount of his bill, as reduced by the items disallowed by the Master.

An attorney cannot take a mortgage security, *ab ante*, to cover future costs for business to be done by him.

(*k*) *Bignot v. Bignot*, 11 Ves. 328; *the King v. Bach*, 9 Price, 354: See *ante*, p. 52.

(*l*) *Ex parte Arrowsmith*, 13 Ves. 125.

(*m*) *The King v. Bach*, *ubi supra*, p. 355.

The statute of limitations applies to attornies' bills.

An attorney must not take a gift from his client, though professedly in lieu of payment of his bill; until all influence arising from the relation has ceased; then, if the transaction has been perfectly fair, it may be supported.

Not of course to refer a bill of costs for taxation, after payment and long acquiescence;

in what cases it may be done.

bills of costs, in respect of business to be subsequently done (*n*). It has been resolved, that, the statute of limitations will extend to attornies' bills, though they are things done of record (*o*).

An attorney (as was intimated, at the commencement of this title,) cannot take a gift from his client, whilst the latter is in his hands (*p*), although such gift profess to be in lieu of payment of his bill: for there would be no bounds to the crushing influence of an attorney who has the concerns of a man under his direction, if the rule were not so: but once extricate the client, and shew that there has been no misunderstanding of the effect of the transaction on his part, nor any misrepresentation as to the value of the gift, or otherwise, on the part of the attorney; and the act may be sustained (*q*). And, certainly, when a bill of costs has been settled and paid, and the payment long acquiesced in, a Court of Equity will not refer that bill to be taxed, as a matter of course. If it be shewn, by *affidavit*, that the business has not been done, or that the charges are fraudulent; then, neither a security given, nor actual payment made, nor a release (*r*), nor a judgment acknowledged (*s*) for the demand, will preclude

(*n*) *Pitcher v. Rigby*, 9 Price, 83.

(*o*) *Vaughan v. Guy*, Mosely, 245.

(*p*) *Goddard v. Carlisle*, 9 Price, 182: *ante*, p. 53.

(*q*) *Welles v. Middleton*, 1 Cox, 125; *Montesquieu v. Sandys*, 18 Ves. 313; *Morse*

v. Royal, 12 Ves. 372; *Harris v. Tremeneere*, 15 Ves. 39; *Gibson v. Jeyes*, 6 Ves. 271, 278.

(*r*) *Hazard v. Lane*, 3 Meriv. 291.

(*s*) *Drapers' Company v. Davis*, 2 Atk. 295.

preclude taxation : but where there has been great delay in making the complaint, there should be an *affidavit*, bringing forward a special case of exorbitant and improper charges ; for, whilst ample protection will be given to the client, protection is, on the other hand, also due to the officer of the Court (*t*): a temperate and just consideration, therefore, must be applied to each case. If gross errors, charges amounting to imposition and fraud, are distinctly pointed out, the Court will open the whole account; but, when there has been long acquiescence, although the charges may be in some respects improper, if they do not amount to fraud, the Court will not direct a taxation, after a formal settlement, and security given, or actual payment made (*u*). We have seen, above, that according to Lord Hardwicke's decision, a judgment entered up in pursuance of a warrant of attorney, is not a bar to taxation : but, whether an attorney's bill can be taxed after a verdict for the full amount; and whether any distinction, in this respect, ought to be made between a verdict obtained by default, and one given after a full and solemn trial, seems not to be quite settled. The preponderance of authority, however, as well as of equitable principle, appears to be against allowing a party first to take his chance of a trial, and afterwards permitting him to come to the

An *affidavit*, shewing specific grounds for the interference of the Court, required ; for protection is due to the solicitor, as well as to the client.

Whether an attorney's bill ought to be taxed after verdict obtained for the full amount? *quare.*

(*t*) *Plenderleath v. Fraser*, 3 Ves. & Bea. 175; *Langstaffe v. Taylor*, 14 Ves. 264; *Pistor v. Dunbar*, 1 Anstr. 188. (*u*) *Cooke v. Setree*, 1 Ves. & Bea. 127; *Plenderleath v. Fraser*, 3 Ves. & Bea. 176.

the Court to reduce the *quantum* found (v). But in one very recent case, the Court of King's Bench, though with great reluctance, and observing, that they were by no means disposed to encourage the practice of taxing an attorney's bill after verdict, did yet allow it to be done (w).

An attorney, by merely indorsing a bill drawn in his favor, for sums due to his employer, is not liable in respect of such indorsement, either to his employer, or to a third person who has taken the bill with full knowledge of the circumstances;

but a solicitor's claims in respect of professional services, cannot raise a case of mutual account; though they may be a proper subject of set off.

Where the general and immediate agent of an administrator has employed a solicitor, at a distance, as local agent for the purpose of getting in debts due to the estate, which is the subject of administration; should the solicitor, in order to make a remittance to his employer more conveniently, procure a banker's bill, which is by inadvertence drawn in his own favor, so as to make it necessary he should indorse it, but without any intention to warrant its payment by so doing, Equity will restrain an action commenced against him in respect of such indorsement; whether the action be commenced by the employer, or by a banker with whom the bill has been deposited, and who has given the employer credit for the amount, provided the banker can be shewn to have been acquainted with the circumstances of the transaction, and the relative situation of the parties (x): but, a solicitor will not be held entitled to the interference of a Court of Equity, to protect him from an action upon a promissory note, given by him to his client, who, as the solicitor alleges, is largely indebted to him for professional services.

Supposing

(v) *Hewitt v. Ferneley*, 7 Price, 236; *Hooper v. Till*, Dougl. 199; and see *Thwaites v. Piper*, 3 Dowl. & Ryl. 195.

(w) *Nuttall v. Marr*, 3 Dowl. & Ryl. 38.

(x) *Kidson v. Dilworth*, 5 Price, 572, 575.

Supposing the fact to be so, it still constitutes nothing like a mutual account; to raise which, there must be monies paid, or accounted for, on both sides: the demand is more properly a subject of set off, and that is the course which the solicitor should pursue^(y).

^(y) *Hurst v. Peirse*, 4 Price, 345.

CHAPTER III.

Fraud in prosecuting, or delaying (by connivance or otherwise) the Prosecution of Suits:—as, also, by improperly resisting, or delaying the satisfaction of just demands;—or insisting on undue charges in taking accounts;—and in matters of Practice, generally.

In what case
the Court will
stop a suit,

guarding against
a fraudulent use
of the indulgence
by the defendant.

IN order to save unnecessary expense, Courts of Equity will, at any time, stop a suit, when a defendant submits to satisfy the plaintiff's just demands (*a*): for, in such case, it would be mere oppression in the plaintiff to desire to go on with the cause. But, on the other hand, if the defendant, in fraud of his tendered submission, omit to discharge the plaintiff's demand, with taxed costs, at the time appointed by the Court; the defendant will render himself liable for the costs of all proceedings consequent on the order made upon his application, and the plaintiff will be at liberty to renew proceedings in the cause (*b*).

A creditor
may prosecute a
decree, when the

Great mischief may happen by the neglect of parties, whose proper business it is, to execute a decree:

(*a*) *Praed v. Hull*, 1 Sim. & Stu. 332.

(*b*) *Boys v. Ford*, 4 Mad. 43.

decree (c): and where a Court of Equity has assumed the administration of a debtor's assets; and enjoined the creditors from proceeding at Law; it is most reasonable that any creditor, bound to abide by the suit in Equity, should be at liberty to prosecute it, when the proper parties for that purpose are guilty of delay (d). An application of this nature is usual; and, undoubtedly, the practice ought to be so; because one creditor may very likely be the friend of the party indebted, or his representatives, and inclined unjustly to favor the debtor's estate: for the purpose of prompting diligence, the Court will even go to the extent of allowing costs to the creditor making the application. And if such creditor, (having been sole plaintiff (e),) die after a decree obtained in the suit, as his representatives have an interest in its prosecution in respect of the costs already incurred, no other creditor will be permitted to file a supplemental bill, without notice to such representatives; who will be at liberty to revive, within a limited time (f). If neither the heir nor executor of a deceased debtor will institute a suit, to make real and personal property, to which he had a claim, available for payment of his debts; a creditor will, under such special circumstances, be allowed to redeem a mortgage given by his debtor,

proper parties are guilty of *laches*;

he will be allowed his costs;

and if he die, having been sole plaintiff in a suit in which a decree has been obtained, his representatives may revive.

If the heir, or executor, will not make a debtor's claims available for payment of his debts, a creditor may take the necessary proceedings:

(c) *Creuxè v. Hunter*, 2 Ves. Jun. 164; *Powell v. Walmorth*, 2 Mad. 183.

(d) *Edmunds v. Ackland*, 5 Mad. 31; *Fleming v. Prior*, 5 Mad. 423.

(e) *Burney v. Morgan*, 1 Sim. & Stu. 361.

(f) *Dixon v. Wyatt*, 4 Mad. 392.

and, in some cases, one defendant may prosecute a decree against another;

or, if a suit has been instituted, but is negligently carried on, a creditor may obtain leave to prosecute it.

Simple contract debts, although liquidated by a report and decree, do not carry interest.

or, or to sue the parties accountable to his debtor's estate: the necessity of allowing this will be more evident, when the executor has become a bankrupt (*g*): or collusion can be brought home to him (*h*). And under certain circumstances, also, (as when a co-obligor, or surety, discharges a demand, which was properly the debt of his principal), one defendant may obtain permission to prosecute a decree against another (*i*).

The principle already stated, with respect to cases where a decree has been made, applies, with equal force, when a suit is only commenced by the next of kin, for the administration of a deceased debtor's estate; if there be sufficient proof, that reasonable diligence has not been exerted, any creditor may obtain permission to prosecute the suit: for if the mere institution of an amicable suit concluded all other claimants from proceeding, it is obvious, that the grossest fraud might be practised upon creditors (*k*). But, on the other hand, if it were understood to be of course, that, after liquidation of a simple contract debt, by a report and decree, the accumulated sum would carry interest; those who ought to be most active in prosecuting the decree would then become more negligent than the parties interested in the estate; and the consequence would be that, although any one

(*g*) *Bourroughs v. Elton*, 11 Ves. 36.

(*h*) *Alsager v. Rowley*, 6 Ves. 750; *Benfield v. Solomons*, 9 Ves. 86; *Doran v. Simpson*, 4 Ves. 665; *Troughton v. Binkes*, 6 Ves. 575;

Newland v. Champion, 1 Ves. Senr. 106.

(*i*) *Walker v. Preswick*, 2 Ves. Senr. 622.

(*k*) *Sims v. Ridge*, 3 Meriv. 463; *Manaton v. Moleworth*, 1 Eden, 24.

one creditor may, when he pleases, obtain an order to prosecute the decree, his motive for execution would be at an end; he might think it most for his advantage to lie by; and the charge of interest might eat up the estate. To obviate this evil, the constant course of the Court of Chancery is, that, debts carrying interest have interest computed, by the Master's report, down to actual payment; but simple contract debts, not carrying interest, have no interest computed by the report; nor is subsequent interest computed upon any other sums than those upon which the Master has computed interest up to the date of his report. For a plaintiff cannot, in a Court of Equity, pray interest for delay of payment, upon a decree; where there has been no actual fraud, and the debt does not by contract, or in its own nature, carry interest (*l*).

The rule as to computing interest; which is not given for mere delay of payment,

unless the debt, in its own nature, or by contract, carried interest.

Interest upon the balance of a stated account may be recovered at common Law, in the shape of damages; but not as interest due by contract: and such damages cannot be proved under a commission of bankrupt (*m*): or allowed in the distribution of an insolvent estate (*n*). But, in cases not affected by bankruptcy, special grounds may be shewn, making it equitable to give interest upon a stated account (*o*): thus, the balance of accounts stated

In what cases interest upon the balance of a stated account is allowed; and when it cannot be claimed.

(*l*) *Creuzè v. Hunter*, 2 Ves. Junr. *ubi supra*; *Anderson v. Dwyer*, 1 Sch. & Lef. 804; *Lorndes v. Collens*, 17 Ves. 29; *Mellish v. Mellish*, 14 Ves. 517: see *post*.

(*m*) *Ex parte Furneaux*, 2 Cox, 219; *Ex parte Koch*, 1 Ves. & Bea. 345.

(*n*) *Bell v. Free*, 1 Swanst. 91.

(*o*) *Boddam v. Riley*, 1 Br. 239.

Where compound interest given.

Rules of proceeding to set aside, or surcharge and falsify, settled accounts.

stated between merchants will carry interest (*p*); for it is not only equitable as between the parties, but in furtherance of commercial policy that they should do so. Such settlement or acknowledgment by the debtor, raises, indeed, a contract to pay, which lays a sufficient ground for giving interest (*q*). And fraud may induce a Court to give, not merely interest, but compound interest, upon balances improperly retained, more especially by parties in confidential situations (*r*).

Settled accounts are never set aside but for fraud; or allowed to be surcharged and falsified but for error; if error can be shewn, a Court of Equity will correct an account, as far as it is erroneous, whether the parties have so stipulated, or not. But, where it is sought to surcharge and falsify a settled account, the rule is fixed, upon the most obvious principle, that some specific error must be charged; as it would be impossible for the defendant to protect himself against a general allegation of error (*s*). An exception, however, to this general rule has been made, where, upon the face of the account, one party, holding a confidential situation with regard to the other, has admitted that he has not given such credit, and produced such a statement, as his employer was entitled to have. In that case, a general charge of error

was

(*p*) *Barwell v. Parker*, 2 Ves. Senr. 365.

(*q*) *Boddam v. Riley*, 2 Br. 2; *Brown v. Barkham*, 1 P. Wms. 653.

(*r*) *Tebbs v. Carpenter*, 1 Mad. 300.

(*s*) *Chambers v. Goldwin*, 9 Ves. 266; *Drew v. Power*, 1 Sch. & Lef. 192; *Palmer v. Mure*, 2 Dick. 490.

was held sufficient (*t*). And where a fact is charged in a bill, which fact, in construction of Law, amounts to a fraud, in the legal sense of that term, it is not necessary that the plaintiff should apply that term to it in his bill (*u*).

The statute of limitation of personal actions (*w*), was framed with a view, not only to quiet men's rights, but, to suppress frauds in setting up stale demands, when the vouchers, or testimony, that such demands have been satisfied, may, probably, be lost. It is obvious, however, that this latter mischief can never arise; when, within the time limited, there has been a declaration made, amounting, by necessary implication, to an admission that the debt is still due. Courts of Law seem, at least formerly, to have been astute in collecting this implication from slight circumstances; and though this has been regretted (*x*), yet, the Judges who expressed that regret have felt themselves bound by a long train of decisions. There seems, however, to be no inclination in those Courts to go beyond actual precedents, in making constructions against the letter of the statute (*y*); which, Lord Eldon has intimated, are equally against its principle: though his Lordship added, the only safe course, upon an application of the kind under question, is to be silent (*z*).

Stale demands
discountenanced;

but, a slight inferential acknowledgment that a debt remains due, takes the case out of the statute of limitations.

It

(*t*) *Matthews v. Wallwyn*, 4 East, 608; *Hellings v. Shan*, Ves. 125. 7 Taunt. 611.

(*u*) *Knatchbull v. Kissane*, 5 Dow. 408. (*y*) *Beale v. Nind*, 4 Barn. & Ald. 571.

(*w*) Stat. 21 Jac. 1, c. 16, s. 3. (*z*) *Baillie v. Sibbald*, 15 Ves. 192; *Ex parte Dewdney*,

(*x*) *Bryan v. Horseman*, 4 15 Ves. 492.

Courts of Equity will not allow a creditor, who comes in under a decree, sums which he could obtain at Law only in the shape of damages.

Interest given on a promissory note, payable on demand, or at a day certain.

No interest upon the balance of an open and mutual account;

unless retained fraudulently.

It does not necessarily follow, that a creditor who comes in under a decree, will have his claims allowed to the extent which he might have recovered at common Law; the regular practice of Courts of Equity is, not to allow to such a creditor any thing which would be given to him at Law in the shape of damages only: and though it has long been of course for a jury to give interest on a promissory note; yet, it was formerly held, that, a creditor could not, in the Court of Chancery, be allowed interest upon a debt so constituted (a). The latter branch of this doctrine, however, is now overruled; a promissory note, payable upon demand, or at a day certain, is considered as a written contract, upon which interest will run from the time when payment ought to be made. A valid agreement to give promissory notes, will come within the same principle (b).

We have just seen instances, in which interest has been allowed, in Equity, upon the balance of a *stated* account; but upon the balance of an *open* and mutual account,—even though some of the *items* may arise upon specialties,—no interest can be given; for the balance is only a simple contract debt. To lay the foundation of any claim for interest, in such case, there must, at all events, be shewn an unjust detention of the debt, shewing fraud or breach of trust; or proof given that interest has been made of the balance (c). Where the

(a) *Rigby v. Macnamara*, 2 Cox, 240.

(b) *Upton v. Lord Ferrers*, 5 Ves. 803; *Lowndes v. Colless*, 17 Ves. 29.

(c) *Barret v. Goodere*, 1 Dick. 428; *Earl of Bath v. Earl of Bradford*, 2 Ves. Sen. 588.

the equity of the case requires it, interest may, by the course of the Court, be given upon further directions, although it was not reserved by the decree (*d*).

Interest may be given on further directions:

It is not the general rule to allow interest for the arrears of a jointure; the Court will require a special case for that; such as the being obliged, in consequence of the non-payment, to borrow money: and then, according to Lord Hardwicke, interest will be given from a reasonable time (*e*).

Not usually allowed upon arrears of a jointure; a special case must be shewn.

So, where there has been gross misconduct, by delay in the execution of an order, or decree, for payment of money, the negligent party will be compelled to pay interest: for no man must take upon himself, though with the tacit acquiescence of the other side, to dispense with an order of the Court (*f*). The allowance of interest upon arrears of annuities, and of dower, stands upon the same footing as before mentioned with respect to arrears of jointure: as a general rule, interest cannot be claimed in such cases (*g*); but, there are numerous authorities, that, under special circumstances, it may be given (*h*): for interest is a thing

Interest may be ordered for neglect of payment under a decree.

Interest not, in general, given upon arrears of annuities, or dower;

but may be allowed under particular circumstances.

pretty

(*d*) *Goodere v. Lake*, Amb. 584; *Sammes v. Rickman*, 2 Ves. Junr. 37; *Champ v. Mood*, 2 Ves. Senr. 470.

(*e*) *Bicknell v. Brereton*, 2 Ves. Senr. 662; *Stapleton v. Conway*, 1 Ves. Sen. 428: but see, *contra*, the dictum of Lord Thurlow, in *Tew v. Earl of Winterton*, 1 Ves. Junr. 452.

(*f*) *Sammes v. Rickman*, 2 Ves. Junr. 38; *Bickham v. Cross*, 4 Br. 319, in note. See *ante*, p. 60.

(*g*) *Signal v. Brereton*, 1 Dick. 278.

(*h*) *Morgan v. Morgan*, 2 Dick. 644; *The Drapers' Company v. Davis*, 2 Atk. 211.

pretty much in the discretion of the Court (*i*); although that discretion is never exercised arbitrarily, but is regulated by the merits of each particular case (*k*).

Rule in Equity, as to interest upon arrears of a rent charge;

if given by way of maintenance, the claim to interest stronger.

The penalty of a bond, regularly, the limit of the debt; but subject to equitable exceptions.

Whenever a rent-charge, or annuity, is secured by a clause of entry, or a bond with a penalty, which the grantor must undergo, if the grantee sued at common Law, and which would oblige him to come to a Court of Equity for relief; the Court will not aid him, except upon equal terms; which can be no other than payment of interest upon the arrears, for the time during which payment has been withheld (*l*): the Court, in Lord Hardwicke's opinion, should more especially insist on this condition, where the rent-charge, or annuity, has been given by way of maintenance (*m*). And although, in general cases, the penalty of a bond is the utmost limit of a demand in respect thereof; yet, where the obligee has been restrained, by injunction, from proceeding at common Law, whilst the demand was under the penalty; there, the decree in Equity may be for payment of principal and interest beyond the penalty of the bond (*n*). For a plaintiff, in such cases, must make up his mind to

(*i*) *Litton v. Litton*, 1 P. Wms. 543. *Atk.* 579; *Robinson v. Cumming*, 2 *Atk.* 411.

(*k*) *Morris v. Dillingham*, 2 Ves. Sen. 170.

(*l*) *Countess of Ferrers v. Earl Ferrers*, Ca. temp. Talb. 2.

(*m*) *Newman v. Auling*, 3

(*n*) *Pulteney v. Warren*, 6 Ves. 79, 86; *O'Donnel v. Browne*, 1 Ball & Beat. 263; *Duvall v. Terry*, Show. P. C. 16; *Hale v. Thomas*, 1 Vern. 349.

to have either all law, or do all equity (*o*). So, where a writ of error has been brought upon a judgment for a bond debt; and this appears to have been done merely for delay; interest may be allowed beyond the penalty (*p*). And as it is the regular course to allow a mortgagee interest upon his costs, from the time they are ascertained by the Master's report; the same may also be done in favor of other parties, where justice requires it (*q*).

Interest upon the costs of a mortgagee, when allowed.

Where the legal remedy has been lost, by delivering up the instrument evidencing a claim, by acknowledging satisfaction upon a judgment, or by a release or acquittance; and this was done in ignorance of a transaction which would have made it conscientious to hold the instrument, upon which the party could have prevailed at Law; or might properly have withheld any acquittance; Equity will give relief (*r*): and not hold an account so settled to be conclusive (*s*).

Where Equity will open an account, although satisfaction of all claims has been acknowledged.

Though a decree for payment of a debt is equal to a judgment (*t*), that is only as to personal estate (*u*); a decree does not directly affect land, until sequestration, or decree *for sale* (*w*). But after an

In what sense a decree is equal to a judgment.

Rules as to the possession of re-

(*o*) *Hugh Audley's case*, Hardr. 136.

(*p*) *Clarke v. Seton*, 6 Ves. 416.

(*q*) *Bickham v. Cross*, 2 Ves. Senr. 471, and 4 Br. 320, note.

(*r*) *East India Company v. Donald*, 9 Ves. 284.

(*s*) *East India Company v. Neave*, 5 Ves. 185: See *ante*, p. 52, 53. 56.

(*t*) *Gray v. Chismell*, 9 Ves. 125; *Perry v. Phelps*, 10 Ves.

37; *Goate v. Fryer*, 2 Cox, 202.

(*u*) *Bligh v. Earl Darnley*, 2 P. Wms. 621; *Foley's case* 2 Freem. 49; *Mildred v. Robinson*, 19 Ves. 588.

(*w*) *Martin v. Martin*, 1 Ves. Senr. 214.

ceivers, or sequestrators.

an order for a receiver, or sequestration, possession under such order must not be disturbed, without permission of the Court first obtained. The course for a party to take, who is prejudiced by the sequestration, or by having a receiver put in his way, is, either to come in to be examined *pro interesse suo*; or to apply for leave to bring an ejectment (x). And, as an ejectment cannot be brought against a receiver, without leave of the Court; so, neither can he bring (y), or even defend (z) such action, without similar authority.

Proceedings against bodies corporate.

The difficulty arising from the number of parties will never be allowed to baffle the means, which a Court of Equity possesses, of doing effectual justice. If a number of persons think fit to apply for a charter, constituting them a body corporate, whether they do so without looking at the consequences, or otherwise, the right to sue, and the liability to be sued, as such Corporation, necessarily arises; nor will the Court fail to consider them with all the incidents attaching to that capacity: When the Corporation are trustees, they cannot refuse to be trusted as such, and to account to their *cestuis que trust*; with regard to the difficulty in such cases of carrying a decree into execution, it can only be said, that, the decree must be executed as in other cases of trust property. But, where complex and difficult inquiries would be necessary,

(x) *Angell v. Hadden*, 9 Ves. 406; *Dunn v. Farrell*, 1 Ball 335, 337, 339; *Brooks v. Greathead*, 1 Jac. & Walk. 178; (y) *Wynn v. Lord Newborough*, 3 Br. 88.

Kaye v. Cunningham, 5 Mad. (z) *Anonym.* 6 Ves. 288.

cessary, if a fair and reasonable compensation of a plaintiff's claims should be offered by the Corporation, and such offer should be perversely refused, the Court would take that circumstance into due consideration in determining the question of costs (a).

The risk of loss of a deposit, paid to an auctioneer as part of the purchase money of property sold by him, must be borne by the vendor who nominates him (b): the vendor, however, cannot take the deposit into his own hands; for, if the purchase goes off, the vendee may recover the deposit from the auctioneer (c), with interest. And should delay in completing the sale be occasioned by any necessary investigation of the title, but the vendee has been let into possession, and is to be charged with an occupation rent; it is only reasonable, that, he should, on the other hand, be allowed interest upon his deposit (d): though, it seems, a vendor cannot claim interest upon the deposit, even when it has been locked up during the continuance of a suit, rendered necessary in consequence of the refusal of the vendee to complete the contract, on the ground of objections to the title, which, at the hearing, could not be supported (e).

Rules as to deposits, made in part payment upon sales by auction.

Upon a bill filed by a legatee, or a *cestui que trust*, against an executor, or trustee; or by one partner against another; stating a case of gross fraud,

When a receiver granted, upon bill filed.

- (a) *Adley v. Whitstable* Taunt. 626.
Company, 1 Meriv. 109, 111. (d) *Smith v. Jackson*, 1 Mad.
 (b) *Fenton v. Browne*, 14 Ves. 621.
 150. (e) *Bridges v. Robinson*, 3
 (c) *Maberly v. Robins*, 5 Meriv. 694.

The Court does not willingly disturb the legal possession, by appointing a receiver upon affidavits; unless fraud be shewn.

Rules of proceeding in a suit on behalf of an infant, particularly with regard to the conduct of his next friend;

fraud, or breach of trust; and verifying the charge by affidavit; a receiver may be obtained before answer; or the property might be lost (*f*). So, upon the bill of a purchaser, even *pendente lite*, if he can satisfactorily shew, that, although the legal title is under litigation, he has a clear equitable title; a receiver may, in this case also, be had, before answer (*g*). The Court of Chancery, however, as a general rule, does not willingly listen to a motion for a receiver of an estate, of which the defendant is in possession, under a legal title: cases of fraud, combined with danger to the property, may, certainly, arise, as to which a Court of Equity would interfere upon *affidavits*; but this will be done only in a case of fraud clearly proved, and of imminent danger, if the intermediate possession should not be taken under the care of the Court (*h*). And where the plaintiff has a power of entry and distress, the appointment of a receiver would be a wanton expense (*i*).

The Court of Chancery will change the next friend of an infant, who will not proceed in a cause, if the Court shall deem it a proper suit to go on with (*k*). But, a reference to a Master will not be directed, on the petition of an infant party, to inquire whether due expedition has been used in the

(*f*) *Middleton v. Dodswell*, 13 Ves. 268; *Jervis v. White*, 6 Ves. 739; *Van v. Barnett*, 2 Br. 158. *wood*, 1 Meriv. 55; *Van v. Barnett, ubi supra*; *Duckworth v. Trafford*, 18 Ves. 283.

(*g*) *Metcalfe v. Pulvertoft*, 1 Ves. & Bea. 183.

(*i*) *Buxton v. Monkhouse*, Coop. 42.

(*h*) *Lloyd v. Passingham*, 3 Meriv. 697; *Pritchard v. Fleet-*

(*k*) *Ward v. Ward*, 3 Meriv. 706.

the prosecution of a decree; for, if the Master should report that no one was to blame, there would be no party upon whom the expenses of the inquiry could be thrown. If any fact were shewn to the Court, proving misconduct, or negligence, on the part of the next friend of the infant, he might be removed; but, whilst he continues in that capacity, he is responsible, and a speculative inquiry into his conduct, without any express charge alleged against him, could not, for the reasons above assigned, be directed (*l*).

who will not be removed on vague charges;

The next friend of an infant cannot withdraw himself from that situation, and substitute another next friend to conduct a suit which he instituted. There must at least be a reference to the Master, with a direction that he shall be at liberty to state any special circumstances. It may be that the suit was improperly commenced, or has been improperly conducted, and the next friend will not be allowed to escape thus from costs, to which he may have rendered himself liable (*m*). If the evidence of a plaintiff and next friend appear to be necessary on behalf of a co-plaintiff, the next friend must give security for the costs incurred in his time, before his name will be allowed to be struck out, and another next friend substituted (*n*).

and who cannot withdraw at his own pleasure; on merely substituting another:

he must give security for costs incurred in his time.

A strong case is necessary to obtain a reference, to ascertain whether a suit, instituted on behalf of

A reference to inquire whether a suit, actually

(*l*) *Russel v. Sharpe*, 1 Jac. & Walk. 482.

(*n*) *Witts v. Campbell*, 12 Ves. 493.

(*m*) *Melling v. Melling*, 4 Mad. 261.

instituted on behalf of an infant, is for his benefit; not readily granted:

but a reference to ascertain which of two such suits is most advantageous, may be had:

To what extent two concurrent suits may proceed against infants; though both suits have the same object.

Name of infant plaintiff struck out, without his giving security for costs incurred.

of an infant, is for his benefit: as it is essential for the protection of infants, that such suits should not be discouraged (*o*). And it is in no case competent for the next friend, who by commencing such a suit undertakes on his own part, that, the suit he has so commenced is for the benefit of the infant, to apply for a reference to determine that point (*p*). But where two suits on behalf of an infant have been instituted for the same purpose, a reference is granted, on motion, as of course, to see which is most for the infant's benefit. The party, however, on whose behalf such an application is made, should be a responsible person; as, if the order for reference should turn out to have been improperly obtained, it will be discharged with costs (*q*). And though two suits will not be allowed to go on, at the same time and for the same matters, in the name of an infant plaintiff; yet, other parties cannot be prevented from proceeding severally, at their own risk: but, until a decree in one suit is obtained, another, having the same object, may be carried on by a different plaintiff, notwithstanding infants are made defendants to both suits, and in respect of the very same interests (*r*).

The name of an infant plaintiff may be struck out, on motion, in order that he may be made a defendant (*s*); and he cannot be called upon, as an adult plaintiff would (*t*), to give security for costs incurred.

(*o*) *Stevens v. Stevens*, 6 Mad. 98.

Ch. Ca. 161; *Anonym.* 3 Atk. 602.

(*p*) *Jones v. Powell*, 2 Mer. 141.

(*s*) *Tappen v. Norman*, 11 Ves. 563.

(*q*) *Sullivan v. Sullivan*, 2 Meriv. 43.

(*t*) *Lloyd v. Makeam*, 6 Ves. 145.

(*r*) *Mortimer v. West*, 1 Wils.

incurred. And, it seems, an infant defendant who is abroad may have a guardian appointed to put in his answer, also on motion (*u*); though the practice has, in one case, been said to require, that, a commission should go for that purpose (*w*).

How infant's answer put in.

When a suit on behalf of an infant has been instituted by a solicitor, who has named a *prochein amy* without obtaining his permission; if, on a reference to the Master, the bill be dismissed, as not for the infant's benefit; the party who appears as *prochein amy* on the record will be ordered to pay costs. The Court cannot in that stage of the business enter into the question between the solicitor and the *prochein amy*; the latter must make a direct application against the former, if he acted improperly (*x*).

Practice as to costs, when a *prochein amy* has been named without his assent.

When it was stated above, (in conformity to the authority there cited,) that, a party who commences a suit on behalf of an infant, undertakes that it is for the infant's benefit; it is not to be understood, that, the party stands pledged for the success of the suit: if there were reasonable grounds for bringing on the suit, and if it was carried on properly and without *laches*; though it may turn out unfortunately, the *prochein amy* will be entitled to his costs (*y*). The next friend of an infant will be allowed all his proper charges and expenses, incurred in the prosecution of a suit on behalf of the infant,

A next friend who commenced a suit on behalf of an infant upon fair grounds, allowed his costs, although the suit terminate unsuccessfully.

Costs allowed a *prochein amy*; and trustee.

(*u*) *Jongsma v. Pfiel*, 9 Ves. 857; *Lushington v. Semell*, 6 Mad. 28.

(*w*) *Tappen v. Norman*, *ubi supra*.

(*x*) *Whittaker v. Marlar*, 1 Cox, 286. See the head of "Solicitor and Client," p. 42.

(*y*) *Taner v. Ivie*, 2 Ves. Sen. 468.

infant, under the head of just allowances: the same rule applies to a trustee who has expended money reasonably, in the fair execution of his trust (z). The costs of an infant trustee, directed to convey under the statute of Anne, will be allowed (a).

But gross negligence, in omitting to ascertain plain facts, will subject a *prochein amy* to costs:

and to make satisfaction for any further injury sustained by the infant.

On what terms a plaintiff, on coming of age, may dismiss a bill filed on his behalf when an infant.

The same principle, which guides the Court in encouraging an honest *prochein amy*;—that is, the anxiety to have the affairs of infants properly taken care of;—will involve a dishonest one in the expenses of his own proceedings. Mere mistake or misapprehension will not be sufficient ground for charging a *prochein amy* with costs; if he can be supposed to have meant the infant's benefit (b). But when he has been guilty of gross negligence in not ascertaining a plain fact, the knowledge of which would have shewn the suit could not be sustained, he must pay costs (c). And where there has been any fraud in carrying on, or defending, the cause of an infant, he may either seek satisfaction in the shape of damages at Law against his guardian and next friend, or he may bring his bill in Equity to be relieved, on the ground of fraud (d); or great neglect (e).

A plaintiff may, on coming of age, abandon a suit commenced on his behalf whilst he was an infant; but he cannot compel the *prochein amy* to pay the costs, unless it be established that the bill

was

(z) *Fcarns v. Young*, 10 Ves. 184.

(a) *Ex parte Cant*, 10 Ves. 554.

(b) *Whittaker v. Marlar*, ubi *supra*.

(c) *Pearce v. Pearce*, 9 Ves. 549.

(d) *Richmond v. Taylour*, 1 Dick. 38.

(e) *Kemp v. Squire*, 1 Ves. Sen. 205.

was improperly filed. If this cannot be shewn, the suit will only be dismissed upon condition, that, the (late infant) plaintiff shall give an undertaking to pay the costs both of the defendant, and of the next friend (*f*). An infant is bound by *laches* in a suit (*g*), though, as we have seen, he may have a remedy over against his negligent *prochein amy*: and if, after a decree made in a suit brought on behalf of an infant, the next friend die; the defendant, in that stage, has a right to move in prosecution of the cause; and, on his application, a reference to a Master will be directed, for the purpose of having a new next friend appointed (*h*). So, if the *prochein amy* of a married woman die, another must be nominated, or the bill will be dismissed with costs (*i*).

Infant bound by *laches* in a suit.

Practice when a suit abates by the death of a *prochein amy*.

When a defendant has destroyed the subject of suit, and absconded, Lord Thurlow thought it reasonable that, the plaintiff should be at liberty to dismiss his bill, without costs; unless the defendant found security for any costs which might be given against him, if the cause proceeded (*k*). But this reasoning is not applicable to a case in which the suit becomes futile as to the plaintiff, in consequence of the defendant's bankruptcy: the plaintiff must either dismiss his bill with costs, in order to go in under the commission; or proceed with

Circumstances under which a plaintiff may dismiss his bill, without costs.

Unless when those circumstances arise out of the defendant's bankruptcy.

(*f*) *Anonym.* 4 Mad. 461.

(*i*) *Barlee v. Barlee*, 1 Sim.

(*g*) *Lord Sherbrook, v. Lord* & Stu. 100.

Hinchinbrook, 13 Ves. 396.

(*k*) *Knox v. Brown*, 2 Br.

(*h*) *Bracey v. Sandiford*, 3 186; *S. C.* 1 Cox's Ca. 359. Mad. 468.

Course where
the plaintiff be-
comes bankrupt.

with the suit, making the assignees parties (*l*). On the bankruptcy of a plaintiff, he must either procure his assignees to be made parties, within a limited time, or his bill will be dismissed; but, it seems, without costs (*m*).

As a general
rule, plaintiff
cannot dismiss
his bill without
costs:

in what cases he
may do this on
payment of costs.

Where one co-
plaintiff may
withdraw.

Course of pro-
ceeding where
the bill abates by
the death of one
co-plaintiff.

A plaintiff who has dragged defendants into Court, can in no case, except that above mentioned, dismiss his bill without costs: to dismiss it with costs is a motion of course, before a decree (*n*), but not after (*o*); unless the decree merely directed inquiries; in which case the parties may, by consent, obtain the same order by motion, as could be made upon further directions (*p*). By consent of the defendant, one co-plaintiff may, in ordinary cases, dismiss the bill, as far as he is concerned, with costs (*q*): but co-plaintiffs cannot be permitted to withdraw themselves from that character, if, by so doing, the remaining plaintiffs would be injured (*r*). It must not be understood, however, that, when a suit, brought by two tenants in common of property of any kind, has, by the death of one plaintiff, abated; his representatives can bind the surviving co-plaintiff to go on, by filing a bill of revivor, without his consent: for

circum-

(*l*) *Monteith v. Taylor*, 9 Ves. 616.

(*m*) *Wheeler v. Malins*, 4 Mad. 171; *Randall v. Mumford*, 18 Ves. 428: but the practice in the Court of Exchequer is different; see 2 Fowl. Ex. Pr. 30.

(*n*) *Dixon v. Parks*, 1 Ves. Junr. 402; *Anonym. ibid.* 141.

(*o*) *Carrington v. Holly*, 1 Dick. 281; *Lashley v. Hogg*, 11 Ves. 602.

(*p*) *Anonym.* 11 Ves. 169.

(*q*) *Langdale v. Langdale*, 13 Ves. 167.

(*r*) *Holkirk v. Holkirk*, 4 Mad. 50. See the head of "Solicitor and Client," p. 43.

circumstances may have come to light convincing such survivor that it would be gross injustice for him to pursue the suit. Still, if the representatives of the deceased plaintiff choose to revive (as they may perhaps properly do), it will be necessary for them to bring the surviving plaintiff before the Court in some way; and, if he will not consent to become a co-plaintiff, he must be made a defendant to the bill of revivor (s).

When a plaintiff has suffered three terms to elapse, after answer put in, without a replication, it is a motion of course, requiring no notice, that the bill be dismissed (t): but, it rather seems, that, after a replication filed, as the defendant may re-join *gratis*, and thereby put the cause at issue, he cannot move to dismiss the bill for want of prosecution, for, he may then proceed himself (u): if the plaintiff refuse to join in a commission for the examination of witnesses, the defendant may have a commission *ex parte* (w): and, the next term after publication passed, if the plaintiff neglect to set down the cause for hearing, it may be set down *ad requisitionem defendantis* (x). When this is done, the plaintiff should be regularly served with a *subpoena* to hear judgment: for, notwithstanding his solicitor undertake to appear, without having a *subpoena*, yet, if the plaintiff do not appear, the bill cannot

When a bill may be dismissed for want of prosecution;

not when the cause is in such a stage that the defendant may proceed himself:

the course to be pursued in such case:

necessary to serve the plaintiff with a *subpoena* to hear judgment.

(s) *Fallones v. Williamson*, 11 Ves. 310, 313.

(t) *Naylor v. Taylor*, 16 Ves. 127; *Jackson v. Purnell*, *ibid.* 205; *Day v. Snee*, 3 Ves. & Bea. 171.

(u) Compare *Tozer v. Tozer*, 1 Cox, 288, with *Skip v. Warner*, 3 Atk. 558; and *Squirrel v. Squirrel*, 3 Swan. 250, note.

(w) Toth. Proceed. 16.

(x) *Skip v. Warner*, 3 Atk. 558.

cannot be dismissed, and the cause can only be struck out of the paper: though, on a proper application, the solicitor for the plaintiff will be made to pay the costs occasioned by his default of appearance (*y*). But, when one of two, or more, co-defendants sets down a cause for hearing, it is only necessary for *him* to serve the plaintiff with a *subpoena* to hear judgment. It is proper that the other defendants should be also served with similar notice, but that is the duty of the *plaintiff* (*z*).

When a decree will be prefaced with a direction for payment of costs of motions made in the cause.

Order of dismissal may be discharged on terms.

Defendant may move that the plaintiff be ordered to amend within a fixed time:

or to complete process of revivor.

Where a decree is made for the dismissal of a bill with costs; if motions have been made in the cause, the cost of which cannot be obtained, unless the decree is prefaced with a direction for the payment thereof, it will be so ordered (*a*). But an order for dismissal may be discharged, upon terms, where the delay is accounted for, by *affidavit* (*b*). When a cause has been allowed to stand over, with liberty to amend the bill, if the plaintiff do not amend within a reasonable time; the defendant may move that a limited time may be fixed for making the amendments, and he will be entitled to the costs of such motion, (if costs are mentioned in his notice), as it was the plaintiff's default which rendered the motion necessary (*c*). So, if, after a decree, the plaintiff file a bill of revivor, to which the defendant puts in an answer, but the plaintiff delays

(*y*) *Ellis v. King*, 5 Mad. 21.

(*z*) *Clarke v. Dunn*, 5 Mad. 474.

(*a*) *Wild v. Hobson*, 4 Mad. 49.

(*b*) *Bellingham v. Brutty*, 1 Mad. 265.

(*c*) *Cox v. Allingham*, 3 Mad. 393; *Benedict v. Thackeray*, 5 Price, 592; *Milward v. Oldfield*, 4 Price, 326.

delays to obtain an order for revivor; on the application of the defendant, it will be ordered, that, the plaintiff shall, within a limited time, revive the suit; or, in default thereof, that, the defendant shall be at liberty to draw up the order to revive (*d*). Where an order dismissing a bill for want of prosecution has been obtained, but no proceeding for the purpose of drawing up that order is had for a year; and after that delay an application is made for leave to draw up the order *nunc pro tunc*, which is granted; but still the party delays to serve that order: if, as soon as the order is effectually served, the Court be applied to, to reinstate the cause, the order for dismissal will be discharged; provided that would have been proper had the application been earlier; for whatever *laches* may have occurred, is principally to be attributed to the other party (*e*).

Effect of *laches* in delaying to draw up an order for dismissal.

As an application to dismiss a bill for want of prosecution is proper only when a defendant has no means of taking any step in the cause, such a motion will not succeed where the defendant has filed a general demurrer; for he might himself set down the demurrer for argument (*f*). The same rule, resting on the same ground, holds where a plea has been put in (*g*). A possible case may arise, in which, as the reason of the rule alluded to will not apply, the rule itself will not be called into operation:

Defendant cannot move to dismiss a bill to which he has filed a general demurrer;

or plea.

Exception to the rule that, after issue joined a defendant cannot move to dismiss a bill for want of prosecution.

(*d*) *Gordon v. Bertram*, 1 Cox, 377; *Done v. Allen*, 1 Meriv. 154. Dick. 55.

(*e*) *Browne v. Byne*, 1 Ves. & Bea. 312. (*g*) *Anonym.* Barnard. Ch. Ca. 280.

(*f*) *Simpson v. Densham*, 2

tion: thus, if, after issue joined, the plaintiff be indulged with permission to amend his bill, this is a step which he alone can take; and, if he neglect it, the defendant may obtain an order that he shall amend within a reasonable time, or that the suit shall stand dismissed (*h*).

It should be observed, that, it has been held, a bill will not be dismissed where it appears that a replication was filed on the very day the motion for dismissal was made (*i*): and, in the same case, it was thought immaterial whether the replication was filed before, or after, the motion for dismissal. But, with respect to this last position, at least, the practice is now settled to the contrary: the order of dismissal operates from the time it is pronounced. If this were not the force and effect of such an order, it would be altogether nugatory; and the plaintiff might, the next moment, take a step, by filing a replication, which would prevent its operation (*k*). And though, it seems, the practice of the Court of Exchequer admits this evasion of its orders; yet, where a plaintiff files a replication merely to keep his bill in Court, after an order for its dismissal, he will not be permitted, as of course, to withdraw such replication, and amend his bill; to obtain this indulgence, an *affidavit* of the materiality of the proposed amendment is, at any rate, necessary (*l*).

An order for dismissal operates from the moment it is pronounced, in the Court of Chancery:

in the Exchequer it may be evaded, by filing a replication immediately afterwards: but a replication so filed can only be withdrawn by permission, and on special grounds;

In

(*h*) *Pratt v. Holebrook*, 5 Mad. 31. See *supra*, p. 80.

(*i*) *Reynolds v. Nelson*, 5 Mad. 61.

(*k*) *Lorimer v. Lorimer*, 1 Jac. & Walk. 289.

(*l*) *Philipp v. Sanderson*, 9 Price, 206; *Turner v. Calvert*, 3 Price, 163.

In ordinary cases, it is a motion of course to withdraw a replication and amend a bill, unless some further proceeding has been had in the cause, or the plaintiff has undertaken to speed it. But where any steps whatever have been taken subsequently to filing the replication,—as, for instance, giving rules to produce witnesses,—there, a motion to withdraw the replication, and the rules to produce witnesses, and for leave to amend, is a motion which both requires notice, and, also, a special case (*m*). And if, after long delay, the plaintiffs, by their proposed amendments, offer an entirely different case, upon grounds which, (though some of them may come under the description of new matter,) were, many of them, within their knowledge at the time the suit was commenced; or which, with due diligence, they might then have discovered; leave to introduce, by way of amendment, such facts, constituting substantially a new suit, will be refused, unless the defendants consent to wave the objection; and if the plaintiffs will proceed on such new statement, they must commence *de novo* (*n*).

though in ordinary cases this is a motion of course; if no proceedings have been had subsequently to filing the replication.

Plaintiffs not allowed, after long delay, to make an entirely new case, by amendments introducing facts which they might have brought forward at first.

Where parties have once submitted their rights to the jurisdiction of Equity, a private agreement between themselves, out of Court, will not operate as a dismissal of the bill, and a stay of proceedings in the suit. Some step must be taken in Court, either

A private agreement by the parties, out of Court, will not operate as a dismissal of a bill.

(*m*) *Lord Kilcourcy v. Ley*, *Christchurch v. Simonds*, 2 4 Mad. 212; *Myers v. —*, *Meriv.* 470; *Sharp v. Ashton*, *ibid.* 268. 3 Ves. & Bea. 148; *Vipan v.*

(*n*) *Dean and Chapter of Merton*, 2 *Meriv.* 479.

ther by motion to dismiss the bill, or to stay proceedings (*o*). A bill brought for discovery, merely, cannot be dismissed for want of prosecution; but the defendant may move for his costs (*p*). And a bill to perpetuate testimony may be dismissed for want of prosecution (*q*).

Bills of discovery not dismissed for want of prosecution;

as bills to perpetuate testimony may.

Quære, whether the bankruptcy of a plaintiff abates a suit?

theoretical principle, in this case,

Whether the bankruptcy of the plaintiff abates a suit (*r*); or whether the bankruptcy of the defendant alone has this effect (*s*); is a question which has been much agitated: by the Court of Exchequer it has been, more than once, decided, that, bankruptcy causes no abatement (*t*); whilst the leaning of the Court of Chancery has been to the other side of the question: in principle, the suit is abated, for the plaintiff has lost his capacity to sue. And as, where a bankrupt's bill is dismissed for want of prosecution, he cannot be compelled to pay costs; the necessity of a motion to get rid of the suit is a hardship on the defendant (*u*). But, whilst it is unsettled what may be deemed the effect of bankruptcy as to abating the suit, as all the bankrupt's rights are transferred to his assignees, it is proper, that, they should be served with notice of any motion which may be made for dismissing such suit; in order to give them an opportunity to file a supplemental bill within such time as the

(*o*) *Rowe v. Wood*, 1 Jac. & Walk. 345.

(*p*) *Woodcock v. King*, 1 Atk. 286.

(*q*) *Anonym.* Ambl. 237.

(*r*) *Randall v. Mumford*, 18 Ves. 426.

(*s*) *Russell v. Sharpe*, 1 Ves.

& Bea. 500; *Rhode v. Spear*, 4 Mad. 51.

(*t*) *Taitt v. Carnick*, and *Bramhall v. Cross*, cited, 2 Fowl. Ex. Pr. 30.

(*u*) *Wheeler v. Malines*, 4 Mad. 171.

the Court shall limit for that purpose (*w*). This mode of continuing the suit by supplemental bill, instead of revivor, certainly seems as if bankruptcy were not considered, in the practice even of the Lord Chancellor, when sitting in bankruptcy, as an abatement, whatever the theory of the Court of Chancery may be. If it were deemed strictly an abatement, moreover, an order to dismiss for want of prosecution, would (in this, as in every other case of abatement) be irregular; though it does not follow, that, such order would, therefore, be a nullity; an order, like a judgment, must stand, until it is judicially discharged (*x*). seems at variance with practice.

A plaintiff who has released the principal actor in a fraud, cannot go on against the other parties, who would have been liable only in a secondary degree (*y*). Where a plaintiff brings a bill with a perfect knowledge that he has no right, his bill will be dismissed with costs (*z*): but where a plaintiff may have had sufficient reason for filing a bill, though on the coming in of the answer a good defence appears, the plaintiff may, in some cases, not be made to pay costs; unless he go on after the answer is put in (*a*). But, though it would occasionally be hard, if costs were always to follow the event of a cause; yet, Lord Eldon has declared his conviction, arising from experience, that, upon the whole, such If the principal in a fraud be released, those only secondarily liable are discharged.
Whether costs follow the dismissal of a bill, depends on the circumstances of each case.
No costs where a fair case is brought forward for consideration:

a course

(*w*) *Porter v. Cox*, Buck, 470.

(*z*) *Stockdale v. South Sea*

(*x*) *Boddy v. Kent*, 1 Meriv. 365.

Company, Barnard. Ch. Ca. 367.

(*y*) *Thompson v. Harrison*, 2 Br. 164; *S. C.* 1 Cox's Ca. 346.

(*a*) *Hodgson v. Dand*, 3 Br. 475.

but vexatious resistance of demands, or groundless applications, visited with costs.

In what cases a suit in Equity may be maintained, although the same matter has been previously litigated in another Court.

a course would be most desirable: That, however, is not the present rule: where a fair case for consideration has been brought forward, it is not the practice of the Court of Chancery to visit the party who fails with costs (*b*). Where, however, there has been any thing vexatious in resisting a demand, costs will be given to the party whose claims have been so delayed (*c*). And where a special application is made, essentially of the nature of a rehearing, costs follow the judgment, if that be given unfavourably to the application (*d*).

There are cases in which a Court of Equity will stay proceedings in a suit, which is brought for the very same (*e*) matter as another suit, in another Court of Equity; until the costs of the proceedings elsewhere have been paid, or security given for such payment. But, the same principle does not apply where one suit is in Equity and the other at Law, or in the Ecclesiastical Court. For, admitting the trial to be of the same matter in each Court, it is not in the same mode; that the question has been tried at Law, may, in many cases, be no reason why the plaintiff should not apply to the defendant's conscience; or why, supposing the defendant to admit the truth of the bill, the plaintiff should not be relieved: the principle, therefore, as applied to two suits in Equity, or to one in Equity and one at Law, is perfectly different (*f*). And where a person who in a former proceeding

sued

(*b*) *Staines v. Morris*, 1 Ves. & Bea. 16.

(*c*) *Worgan v. Ryder*, 1 Ves. & Bea. 21.

(*d*) *Willan v. Willan*, 16 Ves. 218.

(*e*) See *post*, p. 90, 91, 92.

(*f*) *Wild v. Hobson*, 2 Ves. & Bea. 109, 111.

sued *in forma pauperis*, has instituted a second suit for the same purpose, not being dispaupered in the former; there is no instance of staying the second proceeding until he has paid the costs (to be fixed by taxation,) of the first suit; unless the new proceeding was to be justly characterized as very vexatious. In such cases, that has been done. A pauper who files an improper bill is liable to be committed; his poverty will not shield him from the consequences of vexatious fraud (*g*).

Suits *in forma pauperis*.

Any agreement for contribution towards the expense of litigating a question, in which the contributors have not a common interest; if the proceeding might be impeached as maintenance, is what the Law will not endure: but such agreements, though not favored, will not be harshly judged of (*h*).

Maintenance, and contribution to expense of suits.

Where a plaintiff in Equity is also proceeding at Law, and it is clear that the object of both proceedings is the same; the defendant, on putting in his answer, may move for an order, that the plaintiff may elect whether he will go on at common Law or in Equity; and, at the same time, may, in general cases, obtain an injunction, until such election shall be made; and after a decree for an account, may have a peremptory injunction to stop all proceedings at Law (*i*). The last observation must be understood with this qualification; when the

Plaintiff compelled to elect in what Court he will proceed; and enjoined in the meantime.

In what stage of proceedings at Law, against an

(*g*) *Pearson v. Belcher*, 4 Ves. 630; *Whitelocke v. Baker*, 13 Ves. 511.

(*h*) *S. C.* 112; *Corbet v. Corbet*, 16 Ves. 411, 412.

(*i*) *Hogue v. Curtis*, 1 Jac. & Walk. 450; *Mocher v. Reed*, 1 Ba. & Bea. 320; *Wilson v. Wetherhead*, 2 Meriv. 406.

executor, the plaintiff will not be enjoined, though a suit for administration of the assets may be going on.

the plaintiff at Law has actually obtained judgment *de bonis propriis* against an executor; then, to delay the creditor by injunction, until it is ascertained, by the account taken in the suit in Equity, whether there are assets of the testator to answer the demand, might be to deprive the plaintiff at Law of the fair benefit of his judgment; the account might not be taken till after all chance of recovering against the executor *de bonis propriis* was entirely gone (*k*). But where, after a decree for administration of assets, the executor has, merely with a view to gain time to apply for an injunction, put in such a plea to an action, brought by a creditor of his testator, as might possibly entitle such creditor to judgment *de bonis propriis*, the injunction will be granted (*l*). For, the mere form of the plea to the action, adopted, inadvertently or otherwise, cannot in fairness make the executor responsible *de bonis propriis*; he will, therefore, be protected; and the creditor will not be allowed to proceed to such judgment, but must come in under the decree, which is in the nature of a judgment for all the creditors (*m*).

After an order to elect, a plaintiff may obtain leave to proceed at Law, to a certain point.

Particular circumstances may induce the Court, even after an order for election, to give the plaintiff liberty to proceed at common Law, so far as those circumstances may require: there is no case in

(*k*) *Terrewest v. Featherby*, 2 Meriv. 481; *Brook v. Skinner*, *ibid.* in note.

(*l*) *Fielden v. Fielden*, 1 Sim. & Stu. 256; *Dyer v. Kearsley*, 2 Meriv. 482. See, how-

ever, *Stephenson v. Wilson*, 2 Vern. 325.

(*m*) *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 40.

in which a Court of Equity would not modify the rule, in order to do substantial justice (*n*). For, there is no rule of practice, in such Courts, which will not yield to special circumstances (*o*): and they will never allow themselves to be so bound by forms, but that they will, if possible, chalk out a way to come at justice (*p*). Though settled practice will never be altered capriciously (*q*); and the Court can only dispense with rules laid down by itself; where an act of Parliament has directed a certain form of proceeding, the Court has no jurisdiction except in the mode prescribed (*r*).

for all rules of practice will be modified, so as to come at justice.

A party is certainly entitled to a full answer before he can be compelled to elect; and a plea cannot, for this purpose, be considered as an answer (*s*): but if no exceptions are taken to the answer, within eight days after it is put in, it is to be assumed, that, the plaintiff is satisfied with the answer: the defendant may then move that the plaintiff may be put to his election; and the plaintiff cannot afterwards suspend the order for election, by moving, *as of course*, for leave to file exceptions, after the eight days, *nunc pro tunc*. In such case he should make a *special* application to suspend the order for an election (*t*). Though, generally

A plaintiff is entitled to a full answer, before he is put to his election.

Rules as to taking exceptions to answers.

(*n*) *Carnick v. Young*, 2 Swanst. 248.

(*q*) *Bowden v. Hodge*, 2 Swanst. 263.

(*o*) *Butler v. Bulkeley*, 2 Swanst. 374; *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 125.

(*r*) *Baynes v. Baynes*, 9 Ves. 462; *Evelyn v. Forster*, 8 Ves. 97.

(*p*) *Wharam v. Broughton*, 1 Ves. Sen. 186.

(*s*) *Fisher v. Mee*, 3 Mer. 48.
(*t*) *Coupland v. Braddock*, 5 Mad. 16.

generally speaking, it is a motion of course to file exceptions to an answer, at any time within two terms and the following vacation; and if the answer has been referred for impertinence, it will be only from the date of the Master's report on this head, that the time for filing exceptions on the ground of insufficiency will run, or an injunction be dissolved; for, till the impertinence is expunged, it cannot be known what constitutes the answer (*u*).

If a plaintiff, before filing a bill in Chancery, commenced a suit in the Exchequer, for the same purpose;

proceedings in the Exchequer will be stayed, if the plaintiff attempt to resume them, after a decree in the cause has been made by the Court of Chancery.

Though, we have seen, a Court of Equity will not, as a general rule, permit a plaintiff to proceed both by suit and by action, at the same time, for the same matters; yet, whether the Court of Chancery will restrain a party in a cause submitted to its jurisdiction, from prosecuting a suit, for the very same purpose, in the Court of Exchequer; is a point which Lord Eldon thought might require consideration (*w*): In the case then before his Lordship there was this peculiarity; the bill in the Exchequer was first filed by a legatee; though a decree was first obtained, in the Court of Chancery, for the administration of the testator's estate; and the ultimate decision of the Lord Chancellor was, that, all proceedings in the suit commenced in the Exchequer should be stayed; but that the parties to that suit should be at liberty to go in under the decree in the Court of Chancery; and should also receive their costs of the Exchequer

(*u*) *Dyer v. Dyer*, 1 Meriv. 14 Ves. 536.
 2; *Fisher v. Bayley*, 12 Ves. (w) *Jackson v. Leaf*, 1 Jac.
 20; *Goodinge v. Woodhams*, & Walk. 232.

Exchequer suit, up to the time of their having notice of the decree (x). His Lordship thus resolved his own doubt, by deciding, that, the Court of Chancery, at least after a decree made in a cause submitted to it, (of which the parties to a suit in the Exchequer may partake the benefit), will injoin proceedings in the Exchequer, notwithstanding the bill in that Court may have been first filed. And Lord Clarendon, more than a century and a half previously, had enjoined proceedings in a cross-suit in the Exchequer, where the original suit had been commenced in the Court of Chancery (y); upon this ground, that, it was not to be permitted that, when a bill is filed in Chancery, the plaintiff should be delayed there by a defendant's artifice in putting in an insufficient answer, whilst a bill in the Exchequer, in the nature of a cross-suit, was posted on; thus ousting the jurisdiction of the Court of Chancery. The converse of the argument, it should seem, would equally hold, if a similar evasion were practised with regard to the Court of Exchequer. But, where no fraud appears, concurrent suits relating to the same subject, in different Courts of Equity, are not incapable of justification; so at least Lord Keeper Coventry thought; who observed, that, there are frequent precedents where a defendant in a Court of Equity hath been admitted to a cross-suit in another Court of Equity, without waiting

A cross-suit in the Exchequer stayed, where the original suit was commenced in Chancery;

and *e converso*.

But, concurrent suits (even cross-suits) relative to the same matter, in different Courts of Equity, have been supported.

(x) *S. C. ibid.* p. 233; and, *Curre v. Bowyer*, 3 Mad. 456.
 as to the question of costs, see (y) *Roberts v. Wilks*, 2 Freem.
Paxton v. Douglas, 8 Ves. 521; 160.
Goate v. Fryer, 2 Cox, 202;

The filing a bill by one creditor, cannot prevent another from doing the same thing.

When proceedings in the Spiritual Court enjoined.

Sequestration for default of answer, or other contempt:

waiting the event of the first suit: for if the plaintiff in that suit surcease, or be dismissed, the other party may have no help to right but by his cross-suit (x). And Lord Keeper North held the same opinion (a). Mr. Baron Clerk, also, declared, that, it never could possibly be a general rule, that one bill only should be depending, where a number of creditors are concerned (b). The same doctrine has been since laid down by still higher authority (c). And, clearly, both by the opinions of Lord Commissioner Eyre (d), and of Lord Chancellor Northington (e), where the suit first instituted, whether in the same or a different Court of Equity, would not, fully and completely, have the same effect, in all respects, as the second suit, both may go on at the same time. The Court of Chancery will restrain proceedings in the Spiritual Courts, in cases where those Courts cannot do complete justice (f).

A sequestration may be awarded against a defendant who obstinately refuses, or neglects, to put in an answer to a bill; or an examination to interrogatories; or who is guilty of a contempt in not producing papers, &c. according to order (g).

A for-

(x) *Cheke's case*, 2 Freem. 162; the case of *Verdall v. Harvey*, *ibid.* is distinguishable; that having been merely a question of personal privilege.

(a) *Newburgh v. Wren*, 1 Vern. 220.

(b) *Anonym.* 3 Atk. 603.

(c) *Good v. Blewitt*, Coop. 198; *Mortimer v. West*, 1 Wils. Ch. Ca. 161.

(d) *Law v. Rigby*, 4 Br. 63.

(e) *Coysgarne v. Jones*, Ambl. 613.

(f) *Backhouse v. Hunter*, 1 Cox, 342.

(g) *Lupton v. Hescott*, 1 Sim. & Stu. 274. See the course of proceeding laid down in *Holme v. Cardwell*, 3 Mad. 115.

A fortiori, a sequestration may issue for non-payment of money into Court: the process will, if necessary in such case, be rendered effectual, by directing any individual in possession of money claimed by the party against whom the sequestration issued, to pay it into Court (*h*). And the effect of a sequestration will never be suffered to be defeated by a voluntary conveyance made *pendente lite* (*i*): though it may be overreached by the execution of a power of revocation, and a limitation of new uses (*k*); or a sale for valuable consideration to a *bonâ fide* purchaser (*l*).

a fortiori for non-payment of money:

the process cannot be evaded by a fraudulent transfer of the property.

To enable sequestrators of real estate, under a sequestration for non-payment of money, to let the same, notice of motion to that effect must be given (*m*); and where the sequestration is on *mesne* process, the sequestrators will not be ordered to make *leases* (*n*): but sequestrators under a decretal order have the same power to sell as on a final decree (*o*).

Distinction between the effect of sequestration on *mesne* process, or under a decretal order.

The course of proceeding in the Court of Chancery, of necessity and from the very constitution of that Court, is not rapid: but there is no disposition

Unnecessary delay in proceedings in Equity discountenanced by the Court.

(*h*) *Francklyn v. Colhoun*, 3 Swanst. 310; *Lady Pelham v. Duchess of Newcastle*, 3 Swanst. 290, in note.

Swanst. 301, note; but see *Bird v. Littlehales*, 3 Swanst. 299, note.

(*i*) *Colston v. Gardner*, 2 Cha. Ca. 46; *Langley v. Bredon*, cited, *ibid*.

(*m*) *Neale v. Bealing*, 3 Swan. 304, note.

(*k*) *Witham v. Bland*, Rep. temp. Finch, 127.

(*n*) *Ray v. ———*, 3 Swanst. 306, note.

(*l*) *Colston v. Gardner*, *ubi supra*; *Hamblyn v. Lee*, 3

(*o*) *Cadell v. Smith*, 3 Swan. 308, note; *S. C.* (though differently entitled, as to the plaintiff's name,) 3 Br. 362.

The usual orders for time granted as of course, only because it would create greater delay to examine, in each case, whether the indulgence was, in that instance, proper.

A defendant once in contempt for want of an answer, must shew a special case to obtain leave to file a plea, or demurrer; and satisfy the Court, they are not merely dilatories.

sition in the Judges presiding there, to extend the means of delay beyond those limits of indulgence which substantial Equity, as well as long custom, has sanctioned. Thus, although a defendant may obtain, as of course, orders for further time to demur, plead, or answer, (not demurring alone), after the regular period for answering is expired; this is allowed in consideration of the utter impossibility, existing in many cases, that, the defendant should be able to put in a full defence within the regular time for answering: and to examine, in every case, whether the indulgence was, or was not, proper in that particular case, would occupy too much time, and, instead of expediting, would incalculably retard the general business of the Court, and the progress of its suitors. But, when, for want of an answer, an attachment with proclamations has been returned against a defendant, he cannot, merely by clearing his contempt, put himself into a condition to move, as of course, for a commission to take a demurrer, or plea, on his part. (*p*): nor, although a plea is, for most purposes, considered as an answer (*q*), can he, under such circumstances, file a plea, without special permission (*r*): Still less would it be allowable for him to put in a demurrer (*s*); for, either of these modes of defence, will, in such cases, be justly open to a suspicion of being resorted

(*p*) *De Minckwitz v. Udney*, 16 Ves. 356.

(*q*) See an exception, in *Fisher v. Mee*, 3 Meriv. 48, before cited.

(*r*) *Broughton v. Jones*, 3 Mad. 43; *Lloyd v. Gunter*, 1 Vern. 274.

(*s*) *Sanders v. Murney*, 1 Sim. & Stu. 227..

sorted to rather for the purpose of obtaining further delay, than of fairly encountering the plaintiff's demands. And as there is little disposition in the Courts of Equity to countenance defences which tend to prevent the progress of suits to a hearing in the ordinary way (*t*); a defendant, who desires to employ such defences, should at least take care to divest them of the appearance of being merely dilatories, and offer them without *laches*.

On the other hand, a plaintiff will not be allowed to press on his cause to hearing, when it is satisfactorily established, that, the defendant has occasioned no improper delay; and that further inquiry into facts is likely to promote the ends of justice. Thus, although publication of evidence has been repeatedly enlarged before; yet, upon proper affidavits, it may be again enlarged, in order that the most complete evidence may be obtained, so as finally to set the question in dispute at rest (*u*). It is a motion of course to enlarge publication where no witnesses have been examined (*x*): and when by accident or surprise publication passes before the defendant has examined his witnesses, if he has been guilty of no culpable negligence, the Court will allow his witnesses to be examined, upon an *affidavit* that the depositions of the plaintiff's witnesses have not been seen. But when the defendant has wilfully neglected to examine

But where justice requires further inquiry,

publication of evidence may be repeatedly enlarged.

Rules as to enlarging publication.

(*t*) Mitford, 181.

(*x*) *French v. Newsey*, 6 Mad.

(*u*) *Barnes v. Abram*, 3 Mad. 52.

examine his witnesses, till after the time to which publication has been enlarged, his irregularity will deprive him of any title to further indulgence (*y*).

If, after publication, further inquiry be necessary, an investigation by a jury may be directed;

All the rules of the Court of Chancery as to publication, chiefly regard the importance of having the whole evidence taken in secret; so as to preclude any examination merely intended to support defective evidence previously given. The Court, however, where it observes that farther inquiry is necessary, never refuses to grant it; either by a reference back to the Master, or before a jury (*z*).

or the Master may be ordered to settle interrogatories.

The interrogatories for this purpose (when the question is not sent to a trial at Law) must be settled by the Master, who will take care that the same witness is not a second time examined to the same facts, after having seen where the cause pinched, and how his testimony bore upon it (*a*).

Mode of clearing contempt for default of putting in an answer:

Where process of contempt has issued for want of an answer; when an answer is put in, the defendant is entitled to be discharged from custody on paying the costs, or, on tender and refusal (*b*). But, in the latter case, an order must be obtained; which is made as of course, upon the Six Clerk's certificate (*c*): for it would be improper to deprive the defendant of his liberty, upon an allegation of the insufficiency of the answer put in, before

(*y*) *Coulthard v. Halstead*, 3 Mad. 429. 265; *Willan v. Willan*, 19 Ves. 592.

(*z*) *Walker v. Wingfield*, 18 Ves. 443. (*b*) *Boehm v. De Tastet*, 1 Ves. & Bea. 327.

(*a*) *Vaughan v. Lloyd*, 1 Cox, 313; *Smith v. Graham*, 2 Swan. (*c*) *Green v. Thomson*, 1 Sim. & Stu. 122.

fore that insufficiency is ascertained (*d*): and, though the consequence, on the other hand, if the answer should be found insufficient, may, also, be mischievous, yet the degree of mischief is not so considerable (*e*). If the costs have been accepted, indeed, the plaintiff must begin *de novo*: but if they were refused, he may go on with the old process, as soon as the answer is reported insufficient; and this without giving notice, for the defendant is bound to take notice of the report (*f*). Consequences of acceptance of the costs.

Where exhibits in a cause are left, under the usual order, in the hands of the clerk in Court for a plaintiff or defendant, it is the invariable practice, if it become necessary to have those exhibits produced in Court, that the clerk in Court in whose custody they are so deposited, or some person authorized by and acting for him, should attend therewith, on payment of his fees and expenses. Such exhibits are never delivered up, for the aforesaid purpose, to any other person, unless by the consent of all parties, and upon payment of the fees of the clerk in Court (*g*). Where the object of a suit is to set aside deeds, the plaintiff has a right to have them produced, and left, in the hands of the defendant's clerk in Court, for the usual purposes of inspection; but, unless a special ground is made out, shewing good reason to believe, Production of exhibits.

Inspection of impugned deeds allowed; but, without a special case, the deeds not ordered into Court.

(*d*) *Bonus v. Flack*, 18 Ves. Ves. & Bea. 327; *Coulson v. 287*; *Balfour v. Farquharson*, Graham, 1 Ves. & Bea. 331; 1 Sim. & Stu. 72. *East India Company v. Dacres*,

(*e*) *Waters v. Taylor*, 16 Ves. 1 Cox, 343. See post, p. 112. 418. (*g*) *Harris v. Bodenham*, 1

(*f*) *Boehm v. De Tastet*, 1 Sim. & Stu. 284.

lieve, that, the deeds will not be produced at the hearing, the Court will not take them into its own possession in the interval. If this were done without any ground of suspicion, beyond the mere suggestion of the bill, it would, to a certain extent, be prejudging the defendant's rights (*h*).

One suit must not embrace distinct matters, requiring a different course as to the publication of depositions.

A plaintiff cannot be permitted to join in one suit, two distinct matters, one of which requires, that, the depositions taken in the cause should not be published until the cause is ripe for hearing, and the other requires a previous publication of the very same depositions. Even in cases where it might be practicable for the parties to get at the same information by a different course of proceeding, that would be no sufficient reason why a Court of Equity should lend itself to an inconsistency; merely because it may be unable to prevent the inconvenience, likely to arise, from being effected without its aid or concurrence (*i*). Where distinct claims against several parties grow out of one cause of suit, so that all may, consistently, be made defendants to the same bill of complaint, though the demands against them are not joint; but the suit is against one as to one subject, and against another as to a different subject: a Court of Equity will permit one defendant to be at liberty to examine another defendant as a witness, saving all just exceptions, upon an allegation, that, he is not interested in the matters as to which it is proposed to examine him. Otherwise, the plaintiff,

In what cases one defendant may examine another as a witness;

(*h*) *Beckford v. Wildman*,
16 Ves. 438. 442.

(*i*) *Dew v. Clarke*, 1 Sim.
& Stu. 115.

plaintiff, making all defendants in the same suit, might by that sort of mechanism deprive one of the benefit of the other's evidence (*k*); contrary to all fair dealing. And a defendant may obtain an order for the examination of a plaintiff, who consents; but, on behalf of the co-plaintiffs, all just exceptions to such depositions will be saved (*l*).
or, a plaintiff, who consents.

If at the hearing of a cause, an issue be directed; though one of the defendants to the suit in Equity decline becoming a party to the issue, he cannot object to being included in the common order for the production of papers; for the Court has power over every party in the cause, who is interested in the question to be tried at Law, to compel such production as may be necessary for a complete trial (*m*). And, of course, a defendant who, by submitting to answer, submits to make discovery, cannot, by merely insisting that the plaintiff is entitled to no relief, resist the production of documents mentioned in his answer, as being in his power; and the contents of which he might have been compelled to set out (*n*).
When an issue is directed, a full production of documentary evidence enforced.
What documents a defendant is bound to produce.

A defendant who omits filing a cross-bill till the original suit is near a hearing, may justly be suspected of taking that tardy step merely for the purpose of delay; if he had filed his cross-bill in due time, he might have moved to have publication in the original cause stayed, until an answer to the cross-bill
In what cases publication in the original suit will be stayed, until a cross-bill is answered.

(*k*) *Murray v. Shadwell*, 2 Ves. 178.
 Ves. & Bea. 405; *Franklyn v. Colquhoun*, 16 Ves. 219. (*m*) *Pindar v. Smith*, 6 Mad. 48.

(*l*) *Whateley v. Smith*, 2 Dick. 650; *Walker v. Wingfield*, 15 Mad. 482. (*n*) *Unsworth v. Woodcock*, 3 Mad. 482.

Depositions taken in a cross cause, after publication passed in the principal cause, cannot be used at the hearing of that cause.

cross-bill was put in; but where he has been guilty of *laches* he cannot stop the progress of the suit against him (*o*). If depositions in a cross cause, taken after publication of those made in the principal cause, were ever admitted as evidence on the hearing of that original cause; parties bringing a cross-bill would continually lie by till the plaintiff in the first suit had finished the examination of his witnesses. However unwilling, therefore, Courts of Equity must always be to shut out any evidence, yet, the general principle is too important to be waved in any case; and as such depositions might be fraudulently made, they cannot be used, even when no such suspicion attaches in the particular instance (*p*).

Why a commission to examine plaintiff's witnesses does not issue before the defendant has answered, or is in contempt:

or at least until he has obtained orders for time.

Depositions made before issue is tendered in a cause, or before the defendant is in contempt, it has been held, are in the nature of voluntary affidavits only; and, therefore, a plaintiff cannot have a commission to examine witnesses abroad, until the defendant has answered, or is in contempt; in the latter case it would be unreasonable, that, the plaintiff should run the risk of losing the testimony necessary to establish his rights, by the default of the defendant (*q*). And it does not seem necessary, that, the defendant should be absolutely in contempt: if the regular time for answering is expired (*r*), though the defendant may have obtained orders for further time, Lord Eldon decided, that,

(*o*) *Coates v. Pearson*, 4 Mad. 262.

(*q*) *King v. Allen*, 4 Mad. 247.

(*p*) *Taylor v. Obee*, 3 Price, 88; *Ridley v. Obee*, 3 Price, 30.

(*r*) *Cheminant v. De la Cour*, 1 Mad. 211.

that, the plaintiff may have a commission before answer (*s*); and, in many cases, it is plain, it might be very mischievous if the defendant could deprive the plaintiff of a commission, during all the period of orders for time. And, under such circumstances, depositions taken before issue joined, may, by order, be read even on a trial at Law (*t*).

Though a proceeding, *merely in Equity*, cannot be restrained by an injunction, granted by another independent Court of Equity, against proceedings *at Law*; yet, where a commission is moved for, in Chancery, in a cause instituted for the purpose of obtaining an examination of witnesses abroad, in support of an action; such a motion must be considered as a step in the proceedings at Law, and, therefore, in contravention of an injunction by the Court of Exchequer, granted to stay proceedings in the action (*u*).

An injunction by one Court of Equity, to stay proceedings at Law, must not be contravened, by applying to another Court of Equity for a commission to examine witnesses in support of the action.

In consideration of the fraudulent management which might be practised, if a witness were permitted to go before commissioners with a prepared deposition; whenever such a fact is disclosed, a Court of Equity, without attending to the particular circumstances, will order the deposition to be suppressed (*w*). The same rule, founded on the same principle, will be observed, when the solicitor for one of the parties has acted as a commissioner (*x*); or, when his clerk has been employed

Depositions, prepared beforehand, suppressed.

As they will be when the solicitor on one side, or his clerk, take part in the execution of the commission.

(*s*) *Bowden v. Hodge*, 2 Swan. 363.

263.

(*w*) *Shaw v. Lindsay*, 15 Ves.

(*t*) *Gordon v. Gordon*, 1 Swan. 383.

171.

(*x*) *Selwyn v. Gill*, 2 Dick.

(*u*) *Novaes v. Dorrien*, 4 Mad. 563.

ployed as clerk to the commissioners for the examination of witnesses (*y*).

Examination as to the credit of a witness, how restricted.

An examination to the credit of a witness who has been examined in the cause, must go only to the credit of the witness, and be confined to such facts as affect credit and character only, and are not material to the matters in issue in the cause (*x*): if, indeed, it be permissible to go into any particular facts whatever; or make any inquiry beyond the dry question,—whether the witness is to be believed on his oath (*a*)? It is obvious, that, the only use of examining to credit is, that the Court may justly appreciate the testimony of the witness, to affect whose credit is the object of that examination. A party, therefore, who executes a commission for that purpose after the hearing of the cause, when it can be of no use, must pay the costs of such unnecessary proceeding. Upon a similar principle, if a party be permitted to go into new evidence upon a rehearing, still, if he even succeed, he ought, when it comes to the question of costs, to indemnify the other party, for not having produced that evidence at the original hearing (*b*).

A party must pay the costs of proceedings which are unnecessary; or not taken in regular time.

Rules of evidence the same in Equity as at Law; but the application of those rules sometimes different: as in admitting the production of secondary evidence.

In general, the *rules* of evidence are the same in Courts of Equity as in Courts of Law; yet, in the *application* of those rules, diversities must necessarily arise, from the different modes of proceeding in the two jurisdictions. The grounds on which

(*y*) *Newton v. Foot*, 2 Dick. & Bea. 153.

793; *Cooke v. Wilson*, 4 Mad. 381.

(*a*) *Anonym.* 3 Ves. & Bea. 94.

(*x*) *White v. Fussell*, 1 Ves.

(*b*) *White v. Fussell*, *ubi supra*.

which secondary evidence of the contents of written instruments is admitted, are in both the same; namely, that, a party has not the means of producing the instruments themselves, either because they are lost or destroyed, or are in the possession or power of the adverse party. At Law, it is not known, till the time of trial, what evidence will be offered on either side: but, even there, when, from the nature of the proceeding, the party must know, that, the contents of a written instrument in his possession, will come into question, it is not necessary to give any notice for its production (c). And, in the Court of Chancery, as each party, before the hearing, is fully apprised of all the parol evidence that has been given on the other side, it is impossible that either should be taken by surprise, or unprepared to produce any written document in his possession, which is referred to in the depositions on the part of his opponent; and there can be no reason for shutting out secondary evidence, for want of notice which would be merely superfluous (d).

Courts of Equity are, properly, very jealous of applications for the re-examination of a witness, from the apprehension that he may, perhaps, be practised upon, in the interval between his first and (his proposed) second examination. And although a witness has, upon his own application and *affidavit*, been permitted to have an opportunity, by a re-examination,

Re-examination of witnesses disliked;

with what restrictions it is sometimes allowed.

(c) *Rex v. Aickle*, 1 Leach's Cr. L. 830, cited and confirmed in *Bucher v. Jarratt*, 3 Bos. & Pull. 145; *How v. Hall*, 14 East, 275.
(d) *Wood v. Strickland*, 2 Meriv. 464.

Cases of evident mistake lay a ground for permitting re-examination:

especially, mistake on the part of the examiner.

But allegation of mistake will not suffice; it must be evident to the Court.

a re-examination, of correcting a specific error; yet the order was expressly confined to that single purpose. To allow a witness, upon his own allegation of mistake, to be examined entirely *de novo*, would be enabling him to throw in the most pernicious alteration of his evidence (*e*). And even with respect to a specific mistake, the indulgence of a re-examination will be but sparingly and cautiously granted. The distinctions upon which it has been granted, or refused, are not always very clearly laid down in the reports; but this principle may, perhaps, be collected from them;—that, nothing but the strongest conviction of a mistake having been really made, will justify an order for a re-examination; but, where it is evident to the Court, that, the inaccuracy in the point to be corrected arose, truly and merely, from a mistake in the witness, it would not be doing justice to the party in the cause, not to permit it to be amended (*f*). And the propriety of such amendment would be still more evident, if the mistake appeared to have originated on the part of the examiner (*g*). But, in every case, the mistake must be evident to the Court itself; the allegation of the witness will not do: in one very special case, in which it was alleged, that, the witness was deaf, and owing to that infirmity had fallen into an error, which he was desirous, from motives of conscience only, to correct; a commission for

(*e*) *Kirk v. Kirk*, 13 Ves. 283, 5 Mad. 469.
286.

(*g*) *Ingram v. Mitchell*, 5 Ves. 299; *Griells v. Gansen*, Cox, 283; *Asbee v. Shipley*, 2 P.Wms. 646.

for his re-examination issued; but was afterwards suppressed by Lord Clarendon, on advising with the Master of the Rolls, and consulting the six clerks (*h*). This judgment is in conformity with modern decisions, and its soundness is evident; for, if a witness, after having once completed his depositions, were allowed to return to correct them; and, still more plainly, if he were allowed, on such re-examination, to introduce new matter; who does not see what latitude would be given to fraud, and artful suggestion, on the part of those interested in the effect of his depositions (*i*)?

Equal mischief might arise from permitting a defendant to amend his answer; but, where no principle of public policy would be infringed by the indulgence, and where it would benefit the plaintiff, (by removing out of his way the effect of a denial, or giving him the benefit of an admission,) the defendant may be permitted to file a supplemental answer. The Court, however, does not listen to the application without the most careful examination; nor without a precise restriction of the supplemental correction to be introduced (*k*): and the indulgence is only to be obtained under very particular circumstances, where it is sought to put on the record an addition prejudicial to the plaintiff.

An application for leave to amend an answer is looked upon with the same jealousy;

and leave to file a supplemental answer is never granted without precise restrictions.

(*h*) *Randall v. Richford*, 2 Freem. 178, and extract from *Reg. Lib.* in second edition of that work; where (it may be observed) the word *plaintiff* is misprinted for *witness*.

Powell, 1 Meriv. 131; *Bott. v. Birch*, 5 Mad. 68; *Asbee v. Shipley*, *ibid.* 469.

(*k*) *Strange v. Collins*, 2 Ves. & Bea. 165, 167; *Livesey v. Wilson*, 1 Ves. & Bea. 149;

(*i*) *Lord Abergavenny v. Ridley v. Obce*, Wightwick, 32.

Form of returning answer taken abroad, by commission.

plaintiff (*l*). Where an answer has been taken by commission abroad, the strict rule is, that, the messenger must make oath, before one of the Masters, identifying the instrument as being that which he received from the commissioners, and as being in the same state in which he received it. The latter part of this oath has been dispensed with, in a case where the answer was opened by mistake, but not then read, by the defendant's solicitor. This permission to file answers with some deviation from strict regularity, is not, however, to be granted without great caution (*m*).

What is deemed to constitute impertinence in answers.

The decision as to what, in each particular case, constitutes impertinence, is not always an easy one. Where what is pertinent is mixed up, in an answer, with what is impertinent, it may be impossible for the Master to separate the one from the other, and he may find it necessary to report the whole impertinent. For, a defendant may set forth an account, by an exhibition of all particulars, in such a way as, though in one sense it may be said to be pertinent, would not be the less nugatory and oppressive (*n*). If a plaintiff really desire to be furnished with these minute details, he will have no difficulty in explaining his purpose by a special interrogatory: but it would be highly inconvenient to hold, that, in answer to the common interrogatories, a defendant would be justified in loading the parties with the expense, which would

A defendant ought not to incur the re-

(*l*) *Edwards v. M'Leay*, 2 Ves. & Bea. 257; *Curling v. Marquis Townsend*, 19 Ves. 631. (*m*) *Cox v. Newman*, 2 Ves. & Bea. 170. (*n*) *Norway v. Rowe*, 1 Mer. 356.

would attend setting forth, in a schedule, a mere transcript of tradesmen's bills, for instance, or the prices in an auctioneer's catalogue (o). All that is required in an answer, is, that, the defendant should, fairly and pertinently, set forth so much of whatever instrument, or other document, respecting which he is interrogated, as is sufficient to satisfy the object and inquiry of the plaintiff's charge and interrogatory. The defendant must not wantonly incumber the record beyond that, so as unnecessarily to harass, and increase the difficulties of the plaintiff (p). A defendant would give information very oppressively, who merely set forth a schedule with reference to transactions spread over a long series of years; and from which schedule it might be nearly impossible to discover the totals really relevant to the question in dispute. It may happen, that, certain descriptions of defendants, (trustees, or executors, for example,) can give no better information; and, that, the accounts will enable the plaintiff to learn as much as the defendants know: but to that extent they must pledge themselves. The Court will not permit accounts to be thrown into the Master's office, unless the body of the answer contain an averment, that, that is the best information the defendants can give (q). As the defendant is never bound to answer such parts of the plaintiff's bill as are not material, it is the constant practice, in the Courts

cord, and create expense, by unnecessary details; as to which he is not specially interrogated:

nor must he throw into the Master's office a mass of accounts, when he is able to give information more succinctly.

What is immaterial in a bill need not be answered.

both

(o) *S. C. Beaumont v. Beaumont*, 5 Mad. 52; *M' Morris v. Elliott*, 8 Price, 676; *Alsager v. Johnson*, 4 Ves. 225.

(p) *King v. Teale*, 7 Price, 280.

(q) *White v. Williams*, 8 Ves. 195.

At what time exceptions to a reported impertinency may be taken.

When objections to a Master's report ought properly to be first made.

Costs of motions abandoned;

both of Chancery and the Exchequer, to decide upon exceptions with reference to their immateriality (*r*): But, exceptions to a report of impertinence cannot be taken *after* the impertinent matter has been expunged; though before this has been actually done, exceptions may be taken to the report, notwithstanding an order to expunge has been obtained: a special application, however, must be made to the Court to suspend, or discharge, the order (*s*): When a question has been referred to a Master, it is generally necessary that objections (if any are intended to be made) should be taken to the draft of the report, before the party can except; in order that the Master may have an opportunity of reconsidering his opinion: and this is not form but substance. If, however, through accident or surprise, that has not been done, the Court will give the party leave to except, upon a proper *affidavit* of such accident or surprise (*t*).

By a General Order (*u*), it is directed, that, "when a party gives notice of motion, and does not move accordingly, he shall, if no affidavit be filed, pay to the other side forty shillings costs, upon production of the notice of motion. But when an affidavit is filed by either party, the party giving such notice of motion, and not moving, shall pay to the other side costs, to be taxed by the Master, unless the Court itself shall direct, upon production

(*r*) *Agar v. Regent's Canal Company*, Cooper, 215; *Hirst v. Peirse*, 4 Price, 344; *Askam v. Thompson*, 4 Price, 337.

(*s*) *Mortimer v. West*, 3 Swanst. 230.

(*t*) *Bowker v. Nixon*, 3 Mad. 439; *Pennington v. Lord Muncaster*, 1 Mad. 555.

(*u*) Dated 5th of August, 181 Stated'3 Mad. 318.

tion of the notice of motion, what sum shall be paid for costs." Until such costs are paid, the party cannot be heard to make any motion in the cause (*w*). And where a party has been directed to pay the costs of previous applications, which costs have been taxed but not paid; any subsequent orders obtained by the same party will, on motion, be discharged for irregularity (*x*). Upon the principle of not allowing one party, vexatiously, to put another to the expense of preparing to meet a question, which, at the expected time for discussion, is abandoned; if a defendant set down a plea for argument, but, when it is called on, do not appear; upon *affidavit* of service upon the plaintiff of the order to set down the plea, it will be overruled; without such *affidavit* the plea can only be struck out; it will not, however, be restored to the paper, unless the party making default properly accounts for his not having been prepared when the plea was called on (*y*).

till such costs have been paid, the party cannot move again in the cause; and if he have obtained any subsequent order, it will be discharged.

Practice when a party who has set down a plea for argument, does not appear at the time it is called on.

A bill of interpleader will lie, although one of the parties claiming the property is out of the jurisdiction; otherwise, by fraudulently absenting himself, he might prevent the other claimant from obtaining justice. If the answer of the absent defendant be not put in, in reasonable time, a perpetual injunction will be awarded against him (*z*); and when an answer has been put in by one of the defendants,

Practice upon bills of interpleader.

(*w*) *Bellchamber v. Giani*, 3 2 Mad. 38.
Mad. 550.

(*x*) *Killing v. Killing*, 6 & *Martinius v. Helmuth*
Mad. 68. & *Schmidt*, Coop. 248; *Stevenson v. Anderson*, 2 Ves. &

(*y*) *Mazzaredo v. Maitland*, Bea. 412.

defendants, should there be any improper delay on the part of the plaintiff in getting in the answers of the other defendant, that will afford a special ground upon which the party who has answered may move to have the money paid out to him, if it has been brought into Court (a).

Bill taken *pro confesso* against an absconding defendant, under the statute.

If a defendant abscond in evasion of process, and in order to disappoint a plaintiff's just claims; the bill may, by statute (b), be taken *pro confesso* against him, and such decree made thereon as may seem just: provided it appear by *affidavit*, that, such defendant had been in England within two years next before the *subpoena* issued. And if a defendant be brought into Court upon *habeas corpus*, and refuse to enter his appearance, the Court may enter it for him, and such proceeding may be thereupon had, as if the party had himself entered an appearance.

The Court may enter an appearance for a defendant who refuses to do so, when brought in upon *habeas corpus*.

Bills taken *pro confesso* against members of Parliament, after the return of process of sequestration.

With respect to persons having privilege of Parliament, it is, by a more recent statute (c), wholesomely provided, that, bills may be taken *pro confesso* against them, after the return of process of sequestration for enforcing their appearance, without the necessity of shewing that they have absconded (which their personal privilege renders an unnecessary evasion) to avoid the process of the Court. It was on one occasion (d), held, (according to the report,) that the 5th section of the last cited statute applied to bills for discovery alone:

(a) *S. C. Hyde v. Warren*,
19 Ves. 323.

(b) Stat. 5 Geo. 2, cap. 25. 868.

(c) Stat. 45 Geo. 3, cap. 124.

(d) *Jones v. Davis*, 17 Ves.

alone: but, in a later case (*e*), it was said, that, this was a misapprehension, and could not govern the practice: principle there clearly seems none for confining the relief given by the act to bills for discovery merely; unless the language of the statute be thought too explicit to admit another construction; but it seems worded with that happy laxity, which leaves to judicial interpretation the task of fixing the meaning of the legislature.

A bill may be taken *pro confesso* although a demurrer, or plea, has been filed, if the same be overruled; or although an answer has been put in, if it be reported insufficient (*f*); for, in none of these cases can it be said that the plaintiff has made defence. And, notwithstanding a full answer has been put into the original bill; yet, if the bill be amended, and the amendments are not answered, the bill may be taken *pro confesso* generally, for the original bill and the amendments form but one record (*g*).

In the ordinary course of the Court a bill may be taken *pro confesso*, after a demurrer, plea, or answer overruled, or declared insufficient.

Where a decree upon a bill taken *pro confesso* is made after appearance, according to the ordinary course of the Court, it can only be impeached by bill of review, or a bill to set it aside for fraud. Where a similar decree is made under the before cited statute of the 5th Geo. 2. the sixth section of that statute prescribes the conditions upon which

Mode of impeaching a decree made upon a bill taken *pro confesso* in the ordinary course of the Court, or under the statute.

(*e*) *Logan v. Grant*, 1 Mad. Lord Arundel, 8 Ves. 88: see 626. See the next chapter. *infra*.

(*f*) *Attorney General v. Young*, 3 Ves. 209; *Turner v. Turner*, 1 Dick. 316; *Davis v. Davis*, 2 Atk. 24; *Gregor v.* (*g*) *Jopling v. Stuart*, 4 Ves. 619; *Bacon v. Griffiths*, *ibid.* in note.

which proceedings may be recommenced, as if no such decree had been made (*h*). It is with this qualification at least, that the *dictum* of Sir John Leach, V. C. must be understood, when he said there was no difference whether a bill is taken

A decree *pro confesso* must be drawn up by the Court, not by the plaintiff.

pro confesso, before or after appearance (*i*). In one respect there certainly seems to be no difference, whenever a bill is taken *pro confesso*, whether in the ordinary course or under the statute, such a decree is to be made as in the judgment of the Court shall seem fit; the plaintiff is not allowed to take such a decree as he chooses to abide by (*k*).

Effect of plaintiff's acceptance of an answer, after an order for taking the bill *pro confesso*.

When, after an order for taking a bill *pro confesso*, an answer is put in, the plaintiff, by accepting (*l*) such answer, waves the process: but the order will not be discharged; where the answer is not so accepted, upon mere payment of costs; the Court will at least see what sort of answer it is proposed to put in (*m*). And if, in such case, an answer be put upon the file, but not accepted by the plaintiff, he may move to have it taken off the file for irregularity: but if he have so far recognized the answer as to take an office copy of it, he cannot

(*h*) *Ogilvie v. Herne*, 13 Ves. 564; *Short v. Downer*, 2 Cox, 84; *Mamer v. Mamer*, 1 Cox, 104.

(*i*) *Landon v. Ready*, 1 Sim. & Stu. 44: See *Nodes v. Battle*, 2 Cha. Rep. 284; *Anonym.* 2 Freem. 127.

(*k*) *Geary v. Sheridan*, 8 Ves. 192; *Knight v. Young*, 2 Ves. & Bea. 186.

(*l*) *Hawkins v. Croke*, Mosley, 389; *Williams v. Thomson*, as the reports of that case, in 1 Cox 413, and 2 Br. 279, are corrected in 11 Ves. 77: and see, *infra*, the effect of such acceptance as to costs of the contempt.

(*m*) *Herne v. Ogilvie*, 11 Ves. 77.

cannot subsequently treat it as a nullity (n). And after an order for taking a bill *pro confesso*; if a defendant apply on the score of surprise, or accident, and within a reasonable time, the Court might, on making out such special case, listen to him (o): but, to get rid of the order, a strong ground is necessary, the Court being very tender of opening a decree of this sort. A distinction must, certainly, be admitted, between default proceeding from obstinacy, and that which may be supposed to proceed from imbecility of mind. The Court would be disposed to assist the latter case; but the fact embracing the whole period of delay, must be established by other evidence than that of the party himself (p).

An order for taking a bill *pro confesso* not discharged, on the defendant's application, unless strong grounds are shewn.

When a defendant to a suit in Chancery, being in the custody of the Warden of the King's Bench, is brought up to the bar of the Court of Chancery, to answer for his contempt in not putting in an answer to the bill filed against him; and, on his persisting in his said contempt, he is turned over to the Fleet, under an order, that, at the return of an *habeas corpus cum causis*, the Warden of the Fleet shall bring him again to the bar: if the defendant cause himself to be removed back to the King's Bench, by *habeas corpus*, in order to elude the process of the Court of Chancery; the bill will be ordered to be taken *pro confesso* against him, unless he put in his answer by the time at which an *alias pluries* would, regularly, have

When a defendant attempts to evade the process of Chancery, by a fraudulent use of the writ of *habeas corpus* sued out in the King's Bench, a bill against him may be taken *pro confesso*.

(n) *Sedgier v. Tyte*, 11 Ves. 1 Cox 413.

202.

(p) *Knight v. Young*, 2 Ves.

(o) *Williams v. Thompson*, & Bea. 186.

have issued against him (*q*). It must be understood, however, that, it is only where a man is confined in another prison under process in a civil cause, that he can be turned over to the Fleet *cum causis*; a prisoner brought up before the Court of Chancery from confinement under a criminal charge, must be remanded to the prison from which he came; and as, in such case, the process of the Court of Chancery cannot reach him, no *alias pluries* can issue, upon which a decree *pro confesso* could be founded (*r*).

Cross-bill for a discovery, if taken *pro confesso*, read as evidence at the hearing of the original bill.

Bill may be taken *pro confesso* though sequestration has been executed.

When a bill may be taken *pro confesso* on motion; and when the cause must be set down:

but in the latter case, the cause may be advanced;

A cross-bill for a discovery, if taken *pro confesso*, may be read as evidence at the hearing of the original bill (*s*); and, as against the defaulter, the allegations in the cross-bill must be taken to be true: nor is a plaintiff to be told, that, because he has a sequestration, for want of answer, executed against a defendant, he must stop there; he may still proceed, in Equity, till he has procured the bill to be taken *pro confesso* (*t*).

If there be only one defendant, who is in custody, the bill may be taken *pro confesso* upon motion; the clerk in Court attending with the record: but if there be more defendants than one, (and, where an only defendant is not in custody,) the cause must be set down (*u*). But such a cause may, on motion, be advanced to the head of the paper (*w*);
for

(*q*) *Sturges v. Brown*, 2 Mer. 511; *Prendergast v. Saubergue*, 2 Meriv. 512, in note.

(*r*) *Moss v. Brown*, 1 Ves. & Bea. 307: and see *Rogers v. Kirkpatrick*, 3 Ves. 573.

(*s*) *Cory v. Gertcken*, 2 Mad. 45.

(*t*) *Davis v. Davis*, 2 Atk. 23, 24.

(*u*) *Seagrave v. Edwards*, 3 Ves. 372; *Attorney General v. Young*, 3 Ves. 209.

(*w*) *Hart v. Ashton*, 1 Mad. 175.

for it would be aiding the fraudulent delay of justice, attempted by the defendant, if the cause were to wait its regular turn for hearing. It is upon this principle, that, if a decree *nisi* has been obtained for default of the defendant's appearance, he will be ordered to shew cause at an early day; without waiting for the decision of the causes already set down (*x*). For it is in the discretion of the Court to direct any cause to be advanced, whenever such a measure appears necessary for the purposes of complete justice (*y*).

as it may when a decree *nisi* has been obtained, if delay would prevent complete justice.

A plaintiff by amending his original bill (however slight the amendments may be (*z*),) after the filing of a cross-bill, loses his priority; and cannot insist on an answer to his bill before he answers the cross-bill. The proceedings on the original bill are not, however, stayed, merely by the amendment; it is necessary, that, the plaintiff in the cross-bill should move for an order to stay proceedings in the original suit until the plaintiff shall have fully answered the cross-bill. When no such order has been obtained, an attachment may be issued by, or an injunction sustained on the part of, the original plaintiff (*a*).

When plaintiff by amending his original bill after a cross-bill filed, loses his priority.

A defendant to an injunction bill may frame a plausible case by way of answer, and then come into Court with an assertion that he has fully answered,

On the coming in of an answer to an injunction bill, exceptions may be shewn for

(*x*) *Margravine of Anspach v. Noel*, 1 Mad. 313; S. C. 19 Ves. 573.

(*z*) *Johnson v. Freer*, 2 Cox, 371.

(*y*) *Hoyle v. Livesay*, 1 Mer. 382.

(*a*) *Noel v. King*, 1 Mad. 394; *Mason v. Murray*, 2 Dick. 536.

cause against dissolving the injunction;

answered, in order to procure the injunction to be dissolved. The Court itself has not the means of judging whether the assertion be true, and can only ascertain the fact by a reference. It is upon this ground (which, though it may occasionally expose a defendant to unmerited inconvenience, is, upon the whole, the course least open to fraudulent abuse,) that, upon an order to dissolve the injunction, unless cause shewn, the Court allows exceptions to be shewn for cause; and that even

even though such exceptions are not actually filed:

but if the Master report the answer to be sufficient, an exception to the report will not uphold the injunction: the rule is the same upon a reference for impertinence.

when no exceptions are actually on the file, upon the plaintiff's undertaking to file them immediately. But if, on a reference to the Master, the answer be reported sufficient, the injunction is *ipso facto* gone, and an exception to the Master's report will not uphold it (*b*). The rule is the same where there has been a reference for impertinence, and the answer is reported to be not impertinent (*c*). And in neither case is the plaintiff without remedy, if the Court should differ from the Master in its opinion as to the sufficiency, or pertinency, of the defendant's answer; for, on the allowance of exceptions to the report, the injunction may be revived (*d*).

A motion for an injunction can only be made on a seal day; except in cases of waste.

An injunction, except it be to stay waste, can, out of term, only be moved for on a seal day: if on that day the party be not *prepared* to move, no injunction can be moved for on the following day,

(*b*) *Vipan v. Mortlock*, 2 Mer. 479; *Botham v. Clarke*, 3 Cox, 429; *Bishton v. Birch*, 1 Ves. & Bea. 44.

94; *Raphael v. Birdwood*, 1 Swanst. 232.

(*d*) *Botham v. Clark*, *ubi supra*.

(*c*) *Corson v. Stirling*, Coop.

day, although motions may then be continued, for it is not a seal day (*e*).

Though Courts of Equity are not disposed to extend the practice of granting injunctions *ex parte* (*f*); more particularly when the inconvenience, which may arise from delay, does not appear to be more prejudicial to the plaintiff, than a summary interposition in the defendant's absence might possibly be to him (*g*); yet, when a case is made by *affidavit*, entitling the plaintiff to the interference of the Court, the balance of convenience must be considered, and when acts are sworn to as threatened, which, if completed, may produce irremediable mischief, it can only be deemed a salutary exercise of jurisdiction to interpose by injunction (*h*). But, when an injunction has been moved for, on the merits disclosed in the answer, and refused; it would be absurd to hold that a plaintiff, merely by amending his bill could obtain an injunction, as of course (*i*). Where an injunction has been granted, merely *ex parte*, for delay in putting in an answer, an amendment, and, under very particular circumstances, a re-amendment of a bill may be obtained, by special motion, without prejudice to the injunction, even after an answer

Injunctions *ex parte*, not granted as of course,

but require a special case, verified by *affidavit*.

When amendments allowed without prejudice to an injunction:

(*e*) *Rowe v. Jarrold*, 5 Mad. 45. *Johnson*, 2 Wils. Ch. Ca. 96. 102; *Crowder v. Tinkler*, 19

(*f*) *Attorney General v. Cleaver*, 18 Ves. 217. Ves. 622.

(*g*) *Winstanley v. Lee*, 2 Swanst. 386. (*i*) *Bliss v. Boscamen*, 2 Ves. & Bea. 103; *Norris v. Kennedy*, 11 Ves. 568.

(*h*) *Attorney General v.*

it is a motion of course, when the injunction was obtained upon the merits, or where an answer has been put in, to which exceptions have been allowed: but the exceptions must first be disposed of.

answer is filed (*k*). If the injunction was obtained upon the merits, a motion to amend, without prejudice to the injunction, is a motion of course, and may be made without notice (*l*): and, where an answer is put in, to which exceptions have been taken, and *allowed*, it is a motion of course, that, the defendant may answer the amendments and exceptions together (*m*): but it is irregular to obtain an order to amend, until the exceptions are disposed of (*n*).

Generally, a defendant, who has once answered, cannot, upon the bill being amended, plead to the whole: but where the amendments make an entirely new case, justice may require a qualification of the general rule.

As a general rule, a defendant, who has once answered, cannot, upon being called upon to put in a further answer to exceptions allowed and amendments, plead to the whole bill. If, however, the plaintiff, knowing his case was open to a plea, so frame his original bill as to make an answer necessary; and, having got that answer, then by amendment changes the whole character of the bill, so as to make it open to a plea; it might be most injurious, in many cases, to confine the plea to the amendments; for, had those amendments appeared as part of the original bill, the very facts to which the answer applied might thereby have been so qualified, that the plaintiff could not have had an answer even to that part of the bill. In such

(*k*) *Sharp v. Ashton*, 3 Ves. & Bea. 147; *Vesey v. Wilks*, 3 Mad. 475; *Pratt v. Archer*, 1 Sim. & Stu. 433.

(*l*) *Pratt v. Archer*, *ubi supra*.

(*m*) *Dipper v. Durant*, 3

Mer. 465; *Abney v. Flood*, 1 Mer. 449.

(*n*) *Dixon v. Redmond* 2 Sch. & Lef. 515; *Edwards v. Johnson*, 1 Pr. 203; *Turner v. Bazeley*, 2 Ves. & Bea. 331.

ble to act forthwith, by taking exceptions himself to the report; as, while these exceptions are depending, the defendant cannot frame his answer: for it would be unreasonable to require him to consider the report, as far as it is in his favor, wrong. Under these very special circumstances, therefore, the defendant will be entitled to eight days time for putting in a further answer, after the exceptions are disposed of (*t*).

Plaintiff should not accept an answer without receiving the costs of a previous contempt.

By accepting an answer, without insisting on receiving the costs of a previous contempt, the plaintiff waves his right to recover such costs by the process of contempt; whether he may be able to obtain them on the hearing, as costs in the cause, is very doubtful (*u*).

Motion for time, made on the same day on which an attachment issues,

or even an answer filed the same day, too late.

When an attachment issues, it is considered as issued on the first moment of the day on which it issues; consequently, a motion for time, made on the day on which the attachment issues, cannot be sustained (*w*). Upon the same principle, if an answer come in the evening before, and be actually filed in the morning of the day on which the attachment issues, the attachment has precedence: and, consequently, so has an injunction founded on such attachment (*x*).

Within what period a demurrer must be put in.

The rule as to orders for time is, that, where the defendant means to demur only, he must do that without

(*t*) *Agar v. The Regent's Canal Company*, 19 Ves. 380.

(*u*) *Const v. Ebers*, 1 Mad. 532; *Anonym.* 15 Ves. 175; *Smith v. Blofield*, 2 Ves. & Bea. 101.

(*w*) *Stephens v. Neale*, 1 Mad. 551.

(*x*) *King v. Harrison*, cited 1 Mad. 551; *Brace v. Webb*, 2 Meriv. 475; *Whitehouse v. Hickman*, 1 Sim & Stu. 103.

without asking time; unless a very special case is made (y): but, although the regular period of eight days after appearance has expired, a demurrer may still be put in, provided process of contempt has not issued (z), and the defendant has not obtained an order for time; or elected to have an injunction taken against him upon a *dedimus potestatem* (a).

If the defendant apply for time, he may ask time to answer only; or for time to plead, answer, or demur; but it is always made a condition of this latter order, that, the defendant shall not demur alone: the Court, as to that, imposes upon him the necessity of such timely attention to the case, as will enable those who are to advise him to determine, whether the defence should be by demurrer in the first instance, or not. Where the application is for time to answer, without more, the general rule is, that, the defendant is bound to answer: for his application is an admission, that, the case calls for an answer, and an answer only. It will require a special case for dispensing with the practice (b). By a "special case" must be understood, in this instance, some peculiar circumstance, as surprise; it is not sufficient to shew, that, a demurrer would be a proper mode of defence (c). The defendant should have considered this in due time; if such an after-thought were admitted, it might be fraudulently used as a means

Under an order for time to plead, answer, or demur, defendant cannot demur only.

A special case of surprise must be shewn by a defendant who wishes to demur, after having applied for time to answer only.

of

(y) *Taylor v. Milner*, 10 Meriv. 309.
Ves. 447.

(z) *Sowerby v. Warder*, 2 Ves. 447.

Cox, 268; *East India Company v. Henchman*, 3 Br. 373.

(a) *Edmonds v. Savery*, 3

(b) *Taylor v. Milner*, 10

Ves. 447.

(c) *Bruce v. Allen*, 1 Mad.

557.

After a demurrer overruled, the application for time to plead, or answer, should be special.

of delaying the plaintiff still further, after the indulgence of the several orders for time had been obtained: and if the demurrer were overruled, the defendant might hope to obtain another order for time to plead, or answer: which order, indeed, according to one case (*d*), is of course; though Lord Eldon has, subsequently, determined, that, a special application is necessary (*e*).

Injunction revived for default of answer to amended bill within the regular time:

Authority has been cited, above, to shew, that, although the regular time has elapsed, the plaintiff may put in a demurrer, at any time before process of contempt has issued: but, for the purpose of reviving an injunction for want of answer to an amended bill, it is enough if the defendant be in default, although not actually in contempt (*f*). And, when, after an injunction has been dissolved upon the coming in of the answer, the plaintiff amends his bill, and requires a further answer; if the defendant pray a *dedimus* to take his answer, this will be considered as a *dilatory*, and the injunction will be revived: for, it would be against common sense, and common justice, to allow a defendant to take advantage of his own *laches* (*g*).

but, the application to revive the injunction must be special.

But, in both these cases, the application to revive the injunction must be special, upon notice; and, in the former of the two cases, supported by *affidavit* (*h*) of the material facts stated in the amendment,

(*d*) *Griffith v. Wood*, 1 Ves. Meriv. 476.
& Bea. 541.

(*e*) *Jones v. Saxby*, Sittings after M. T. 1814; See Reg. Lib. A. 1814, fol. 99.

(*f*) *Vipan v. Mortlock*, 2

(*g*) *Edwards v. Edwards*, 2 Dick. 758; *Bagster v. Walker*, 1 Dick. 109; *Penfold v. Stoveld*, 3 Mad. 472.

(*h*) *James v. Downes*, 18 Ves. 523.

ment, and that they were not in the plaintiff's knowledge at the time when he filed his original bill (*i*).

As a general rule, there should be no motion for a special injunction, after appearance, without notice (*k*); but, if a person against whom a bill is filed to stay waste, could prevent the motion by appearing the evening before, he would get two days for the further commission of, perhaps irreparable, mischief; the injunction, therefore, will not be so delayed: though it might be different if the appearance had been entered long enough to have enabled the plaintiff to give notice (*l*). The fact of the defendant's appearance must be stated, to distinguish the case from the ordinary one of an injunction for default of appearance (*m*).

To obtain a special injunction, after appearance, notice is generally necessary; but cases of waste may require an exception to this rule.

Even after an answer has been put in, *affidavits* may be admitted in support of the allegations made by a bill for an injunction, if those allegations go only to substantiate particular facts stated in the bill, and not noticed by the answer: but *affidavits* are never received in contradiction to assertions positively made by the answer (*n*); or where the facts have not been charged, by the bill, so as to give the defendant an opportunity of answering them (*o*).

Where *affidavits* in support of the allegations of an injunction bill, may be received after an answer put in.

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| (<i>i</i>) <i>Sharp v. Ashton</i> , 3 Ves. & Bea. 148: see <i>ante</i> , p. 83. | Meriv. 1. |
| (<i>k</i>) <i>Marasco v. Boiton</i> , 2 Ves. Senr. 112. | (<i>n</i>) <i>Morgan v. Goode</i> , 3 Mer. 11; <i>Jefferies v. Smith</i> , 1 Jac. & Walk. 300. |
| (<i>l</i>) <i>Aller v. Jones</i> , 15 Ves. 605. | (<i>o</i>) <i>Smythe v. Smythe</i> , 1 Swanst. 253; <i>Lawson v. Morgan</i> , 1 Pr. 306. |
| (<i>m</i>) <i>Harrison v. Cockerell</i> , 3 | |

A special injunction to restrain proceedings at Law, not granted in the first instance: at least where the party might have obtained the common injunction.

If a defendant in Equity put in a demurrer just before the common injunction might have been obtained, merely with a view to post on his action at Law; he will not be allowed to avail himself of this tricky practice.

Injunction to restrain the sailing of a ship; when granted;

and in what cases refused.

A special injunction, to restrain proceedings at Law, is never granted in the first instance, except where the party had not an opportunity of obtaining the common injunction; as, when judgment has been entered up, upon a warrant of attorney (*p*). And, even under these circumstances, the Court of Exchequer has, in a recent case, refused to interfere; intimating that a Court of Law would, on equitable grounds, grant relief (*q*). But, where a defendant in Equity, just before the common injunction might otherwise have been obtained, puts in a demurrer, pending which he posts on his action at Law, and takes the body of the plaintiff (in Equity) in execution, this management will not avail him. If the demurrer cannot be sustained, it will be ordered, that, the plaintiff (in Equity) shall be discharged, on undertaking again to confess judgment, so that he may not say the existing judgment and debt have been satisfied by the execution; which, without such precaution, would have that effect at Law (*r*).

Although there is no doubt of the jurisdiction of the Court of Chancery to restrain the sailing of a ship, on the application of a dissentient part-owner, until security is given for the amount of his interest (*s*); yet, where an injunction, having this object, is only moved for just as the ship is about to sail, no order will be made; at least, not unless

(*p*) *Franklyn v. Thomas*, 3 Meriv. 226; *Annesley v. Rookes*, *ibid.* in note.

(*q*) *Naylor v. Christie*, 8 Pr. 534.

(*r*) *Franklyn v. Thomas*, 3 Meriv. 233, 235; *Raynes v. Wyse*, 2 Meriv. 473.

(*s*) *Haly v. Goodson*, 2 Mer. 79.

unless the party can satisfactorily shew he had no opportunity of coming for relief sooner, and that he was guilty of no *laches*, by fraudulently lying by till after charter parties were made, thereby exposing the defendants to the risk of demurrage and other like consequences (*t*).

A *subpoena* to hear judgment must be properly indorsed to that effect; otherwise the defendant will not be bound to appear; and a decree *nisi*, made for the supposed default, will be discharged, with costs, as being irregularly obtained (*u*). But, the death of one of the defendants does not necessarily prevent judgment (*w*). A party who is served with notice of motion, though not interested therein, is entitled to be indemnified for the expense occasioned by his prudence in appearing pursuant to such notice (*x*).

Subpoena to hear judgment must be properly indorsed.

Judgment after the death of one defendant.

A party served unnecessarily with notice, entitled to costs of appearance.

The right of appeal is so important to the due administration of Equity, that, in order to deprive a defendant of this privilege, the strictest regularity of practice must be pursued; according to which, the docket ought not to be presented to the Lord Chancellor for his signature, until after the order to enroll *nunc pro tunc* has been passed and entered. A *caveat*, too, delays the enrolment twenty-eight days after the docket has been presented, and notice given; and, it is now settled, these must be twenty-eight *clear* days (*y*).

Opportunity of appeal, how secured.

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(*t*) *Christie v. Craig*, 2 Mer. 461.
137.

(*x*) *Heneage v. Aikin*, 1 Jac.

(*u*) *Powell v. Martyn*, 1 Jac. & Walk. 377.
& Walk. 292.

(*y*) *Robinson v. Newdick*, 3

(*w*) *Davies v. Davies*, 9 Ves. Meriv. 15.

Mode of setting aside a decree signed and enrolled.

A decree made absolute, signed and enrolled, can be set aside by original bill only: if such bill contain a charge of gross fraud in obtaining the decree, that charge at least must be denied, and all the alleged circumstances of fraud answered: a mere plea, in bar, of the very decree which is so impugned will be overruled (x).

Writ of *ne exeat* applied to civil causes; but cautiously.

The writ of *ne exeat regno* is a high prerogative writ; which the Court of Chancery does not apply to civil causes without great caution, as it may lead to very extensive, and very harsh consequences (a). Subject to this jealous watchfulness, however, the writ has, for nearly two centuries past at least, been granted, in proper cases, though of private concern; in order to prevent evasion from just demands (b). And the Court of Exchequer grants orders in the nature of this writ, applying such orders, only to such cases as those to which the Court of Chancery would apply the writ (c).

Practice of the Exchequer in this respect.

Grounds for granting this writ:

the debt claimed must be an equitable one;

To support an application for this writ, there must, in general, be an *affidavit* stating positively a debt, actually due (d); and that it is an equitable demand upon which the plaintiff cannot sue at Law (e); and, further, that the defendant intends to

(x) *Lloyd v. Mansell*, 2 P. Wms. 74.

(a) *Howden v. Rogers*, 1 Ves. & Bea. 132; *Dick v. Swinton*, *ibid.* 373; *Hannay v. M'Entire*, 11 Ves. 55.

(b) *Sir Robert Henly's case*, 2 Cha. Ca. 245; *Mead's case*; cited in *Read v. Read*, 1 Cha. Ca. 116.

(c) *Bernal v. Marquis of Donegal*, 11 Ves. 46.

(d) *Cock v. Ravie*, 6 Ves. 284; *Anonym.* 1 Atk. 521; *De Carriere v. Calonne*, 4 Ves. 591.

(e) *Jackson v. Petrie*, 10 Ves. 165; *Pannell v. Taylor*, 1 Turn. & Rus. 103.

to quit the kingdom to avoid payment; or that the debt will, thereby, be in danger of being lost (*f*). The granting this writ when there is a balance due upon account, although the debtor might be held to bail at Law, and the amount due is not certain, has always been considered a case of exception to the general rule (*g*). Cases of alimony, where arrears are actually due, form another admitted exception (*h*). And the necessity of a positive *affidavit* as to a threat, or purpose, of the defendant to go abroad, may also admit a possible exception, when the information has been derived from persons of the defendant's own family, who could not be brought forward to make an *affidavit*. Nor can an *affidavit* of the debt be necessary, where its existence and nature are authenticated by the Master's report (*i*).

or dependent on the balance of an account;

or arrears of alimony.

Exceptions to the rules which require positive *affidavits* that the debtor threatens to go abroad;

and of the nature of the debt.

The actual existence of a money demand being essential to justify the issuing a writ of *ne exeat*; it follows, that, it cannot be granted to enforce specific performance of an agreement (*k*): or to compel the defendant to abide the event of an action (*l*); or to fulfil his undertaking to give an indemnity

The writ only issued on an actual money demand; not to enforce performance of an agreement, or other similar purpose.

(*f*) *Tomlinson v. Harrison*, 8 Ves. 33; *Stewart v. Graham*, 19 Ves. 315; *Etches v. Lance*, 7 Ves. 417; *Jones v. Alephsin*, 16 Ves. 472; *Hyde v. Whitfield*, 19 Ves. 344.

(*g*) *Blaydes v. Calvert*, 2 Jac. & Walk. 213; *Jones v. Sampson*, 8 Ves. 594; *Jackson v. Petrie*, *ubi supra*.

(*h*) *Dawson v. Dawson*, 7 Ves. 173.

(*i*) *Collinson's case*, 18 Ves. 355.

(*k*) *Raynes v. Wyse*, 2 Mer. 473; *Blaydes v. Calvert*, *ubi supra*; *Anonym.* 2 Dick. 497, note.

(*l*) *Gardiner's case*, 15 Ves. 445.

indemnity to the plaintiff who, on the faith of that undertaking, had become a surety (*m*).

In cases of alimony the writ only marked for sums actually due:

to go further would be invading the jurisdiction of the Ecclesiastical Courts.

We have just seen, that, where arrears are actually due in respect of alimony, the writ of *ne exeat* may be applied; but it can only be marked for sums actually due; that is, for arrears and costs: to go further, even when a decree for alimony has been made in the Ecclesiastical Court, would be trenching upon that jurisdiction, which may see cause to vary its decree: and, *a fortiori*, it would, now, seemingly, be impossible to obtain the writ in anticipation of a decree for alimony; for no Court, either of Law or Equity, is authorized to decide whether a woman be, or be not, entitled to alimony; or when she may (if entitled) obtain it, and to what amount: these points are all within the discretion of the Spiritual Court (*n*). Lord Hardwicke's doctrine in this respect,—namely, that, as the Ecclesiastical Court cannot hold to bail, the Court of Chancery would lend its assistance in favor of the wife, and in aid of the Ecclesiastical jurisdiction (*o*); seems overruled (*p*): The objections to it appear, indeed, insurmountable; if such a practice were acted upon, it would not merely obtrude unasked-for aid upon an independent Court, but would forestal

(*m*) *Cock v. Ravie*, 6 Ves. 284.

(*n*) *Shaftoe v. Shaftoe*, 7 Ves. 172; *Haffey v. Haffey*, 14 Ves. 261.

(*o*) *Pearne v. Lisle*, Ambl. 76; *Anonym.* 2 Atk. 210:

and see a similar doctrine held by Lord Nottingham, in *Smithson's case*; 2 Ventr. 345.

(*p*) *Coglar v. Coglar*, 1 Ves. Junr. 95; and the cases cited in the last note but one.

stal the judgment of the only competent jurisdiction.

Lord Thurlow held, that, when the only evidence, in support of an application for a *ne exeat*, was an *affidavit* of a wife against her husband; the writ could not be granted (*q*): Lord Eldon, however, seems to have considered the wife as a competent witness against her husband, in such cases (*r*).

Whether the writ may issue against a husband, on the *affidavit* of his wife alone.

In one case, Lord Manners, Chancellor of Ireland, issued the writ of *ne exeat* in aid of the process of contempt by which payment of costs is enforced (*s*): but, Sir John Leach, V. C., has since decided, that, the writ is not applicable to such a demand (*t*). If the present writer may, without presumption, venture to state his view of a case upon which such high authorities are at variance, the question seems to be, whether the costs of proceedings in Equity do, or do not, when taxed (*u*), constitute a debt; and, if they do, whether the debt is, or is not, recoverable in Equity only (*v*)? If it be established affirmatively, that, costs when taxed, constitute a debt; and that, costs of a suit in Equity ought to be recovered only by process of that Court by which they have been decreed; there

Quære, also, whether the writ can be applied in aid of process of contempt to enforce payment of taxed costs?

(*q*) *Sedgwick v. Walkins*, 1 Ves. Junr. 49. in *Ex parte Hill*, 11 Ves. 650.

(*r*) *Shaftoe v. Shaftoe*, 7 Ves. 171. (*v*) *In re Dillon*, 2 Sch. & Lef. 110; *Ex parte Bellot*, 4 Mad. 379: but see a qualification hinted at, when the party has made himself liable by special agreement, *Hartop v. Jukes*, 2 Mau. & Sel. 440.

(*s*) *Stewart v. Stewart*, 1 Ba. & Beat. 73.

(*t*) *Goodman v. Sayers*, 5 Mad. 471.

(*u*) *Ex parte Sneaps*, cited

Costs frequently form part of the sum for which the writ is marked, but the amount must be ascertained:

for the writ will not issue in prevention of anticipated injustice in every case.

The writ may be obtained before bill filed;

and the bill need not (in many cases ought not) to pray the writ, when it is first filed.

there seems—(it is stated with great submission)—no very evident reason, why a certain equitable debt, so ascertained, should be a less proper subject for this jurisdiction than a debt differently created. And there are numerous instances in which costs have constituted *part* of the sum for which a writ of *ne exeat* has been marked (*w*). Though, to be sure, where no debt can be sworn to, and damages only, of uncertain amount, are *to be* recovered, by a *future* suit, at Law or in Equity, such a demand will afford no reason for issuing the writ (*x*): since it is much too general a ground to take in support of such a proceeding, that the Court of Chancery will in every case interfere to prevent injustice (*y*).

Lord Talbot, C., was of opinion, very strongly, that a *ne exeat* should never be granted without a bill in Equity first filed (*z*); but, both previously and subsequently, this has been held unnecessary (*a*); and, it certainly is not required, that, when a bill is first filed, it should pray this writ. If it was not at that time known, that, the defendant intended to leave the kingdom, for instance, it would have been highly improper then to pray the writ; and it would be an extraordinary exercise of jurisdiction to refuse it, because not asked for in a stage of proceedings when there was no pretence for

(*w*) *Shaftoe v. Shaftoe*, 7 Ves. 592.

Ves. 171; *Dawson v. Dawson*,
ibid. 173; *Oldham v. Oldham*,
ibid. 410.

(*x*) *Flack v. Holm*, 1 Jac. & Walk. 407.

(*y*) *Gardiner v. Edwards*, 5

(*z*) *Ex parte Brunker*, 3 P. Wms. 312.

(*a*) *Lloyd v. Cardy*, Prec. in Cha. 171; *Roddam v. Hetherington*, 5 Ves. 92.

for praying it (*b*). The defendant's own admissions, by his answer, would clearly be as safe a ground for granting the writ as any *affidavit* of the facts (*c*); but, on the other hand, the defendant's answer, or *affidavits*, may also be read to oppose an application for the writ (*d*). And, though a defendant's own admissions might afford a full justification for issuing the process; yet, when it has been previously granted on other, and insufficient, grounds, the defendant's subsequent statement will not sustain the writ. For, the ground on which the writ issued must always be stated in the body of it; and if it, thereby, appear to have issued improperly, it ought to be discharged (*e*). It does not, however, follow, that, the plaintiff may not renew his application, on the new cause shewn.

Defendant's admissions may supply want of affidavit by plaintiff: effect of defendant's answer.

The ground on which the writ issued must be correctly stated in the body of it; or it will be discharged.

If a man has once been arrested and kept in custody, as if the demand against him were a legal one, and is discharged; he cannot be held to equitable bail: the proper regard due to personal liberty makes it necessary, that, a plaintiff should be sure what he is about before he commences proceedings: where, by mistake, he first arrests the defendant, and is compelled to discharge him, the writ of *ne exeat* will not be subsequently issued, in respect of the same demand (*f*): as at Law a

A party once arrested cannot be held to equitable bail: and where a writ of *ne exeat* is granted against a man, he is exempted from subsequent arrest, in respect of the same demand.

party

(*b*) *Collinson's case*, 18 Ves. 373; *Hyde v. Whitfield*, 19 Ves. 345.

(*c*) *Roddam v. Hetherington*, 5 Ves. 95. (*e*) *Hyde v. Whitfield*, *ubi supra*.

(*d*) *Flack v. Holm*, 1 Jac. & Walk. 415; *De Carriere v. De Calonne*, 4 Ves. 584; *Dick* Meriv. 473.

v. Swinton, 1 Ves. & Bea.

party against whom this process had been executed, would be discharged from any subsequent arrest (*g*).

The writ issued on behalf of a lunatic.

Not against a *feme covert* as executrix; unless she possess separate property.

Foreigners; subjects domiciled in our colonies; in Scotland; and, it seems, in Ireland; if they come within the jurisdiction, are amenable to this process.

The writ may be obtained on behalf of a lunatic, upon the oath of his committee (*h*): though it is now settled, (overruling old decisions to the contrary), that a *ne exeat* ought not to issue against a married woman who is administratrix; for as such she can have no separate property. But, the case might be different with respect to a married woman having separate property (*i*).

Although this writ was, originally, applied only to restrain parties domiciled here, from leaving the country; yet it has long been extended to persons who are only temporary visitors for a particular purpose: for the writ is now looked upon only as a civil process to hold a party to bail for an equitable debt; under the same circumstances in which, if the debt were a legal one, he might be held to bail at Law (*j*). Foreigners, therefore, who come within the jurisdiction (*k*); persons domiciled in the colonies; in Scotland; or, it seems, in Ireland (*l*); (though as to the last description of defendants it may be doubted (*m*),) are all amenable to this process.

Where

(*g*) *Flack v. Holm*, 1 Jac. & Walk. 415; *Franklyn v. Thomas*, 3 Meriv. 233.

(*h*) *Stewart v. Graham*, 19 Ves. 316.

(*i*) *Pannell v. Taylor*, 1 Turn. & Rus. 103.

(*j*) *Flack v. Holm*, 1 Jac. & Walk. 416.

(*k*) *S. C. ibid.* but the jurisdiction will be exercised, in such cases, with peculiar caution: see *De Carriere v. De Calonne*, 4 Ves. 591; *Whitehead v. Murat*, Bunb. 183.

(*l*) *Honden v. Rogers*, 1 Ves. & Bea. 133.

(*m*) *Bernal v. Marquis of Donegal*, 11 Ves. 43.

Where there appears to have been needless delay in applying for the writ, it will deserve, and receive, the consideration of the Court, whether the proceeding is vexatious; and whether the plaintiff's *laches* may not render it reasonable to give the defendant relief, upon terms less strict than might otherwise have been imposed (*n*). And as, in every case, payment into Court of the amount claimed, must be the best security for the plaintiff's demand, where this is done, the writ will be discharged (*o*); as it will, generally, where security, approved by the Master, is put in (*p*). But, where it appears, that, besides money payments, there will be other acts which the Court must necessarily, at the hearing, direct the defendant to perform; as, for instance, to deliver up deeds, &c. there, the writ will not be discharged on giving security for, or even depositing the amount of the pecuniary demand; the defendant must, also, give security to perform the whole decree (*q*).

Where there has been needless delay in applying for this writ, or vexation appears, favorable terms will be granted to the defendant.

The writ discharged on payment of the money into Court; or putting in approved security for such payment;

and for performance of such other acts as the Court shall direct.

(*n*) *Dick v. Swinton*, 1 Ves. & Bea. 373.

(*o*) *Stewart v. Graham*, 19 Ves. 314.

(*p*) *Dick v. Swinton*, *ubi su-*

prà; *Atkinson v. Leonard*, 3 Br. 223.

(*q*) *Atkinson v. Bedel*, 1 Dick. 98; *Howden v. Rogers*, 1 Ves. & Bea. 133; *Roddam v. Hetherington*, 5 Ves. 95.

CHAPTER IV.

Fraudulent perversion of privilege by Members of either House of Parliament: and Frauds affecting such parties generally, whether as actors or sufferers.

The Legislature, in order to prevent Parliamentary privileges from being converted into a shield for fraud,

UNWORTHY individuals having, in some instances, perverted those Parliamentary privileges, which have been assigned to them for the public good, into a fraudulent protection of their private interests, and an obstruction of justice; the Legislature, without compromising that personal freedom of all its members, which is essential to every deliberative assembly, has, by several enactments, cautiously provided, that such proper and necessary exemption from the ordinary course of juridical proceedings, should not be employed as an impregnable shield for fraud.

has made enactments for the special purpose of obviating difficulties in proceeding against insolvent members of Parliament: and also to prevent delay in entering appearances for such parties.

Thus the statutes of the 4 Geo. 3, c. 33, and of the 45 Geo. 3, c. 124, were enacted for the special purpose of obviating the inconveniences which might previously have arisen, when parties entitled to privilege of Parliament became insolvent; and also, to prevent delay in entering appearances for such parties, when actions, or suits in Equity, are brought against them (a): and these statutes have

(a) *Read v. Philips*, 16 Ves. 436.

have been repealed in part, only for the purpose, as we shall see, of consolidating them in the recent general bankrupt act (*b*).

By the 5th and 6th sections of the statute, 45 Geo. 3, c. 124, (which sections are unrepealed), it is enacted, that, when any defendant having privilege of Parliament, shall have appeared to any bill filed against him, seeking a discovery upon oath; or when an appearance shall have been entered for such defendant, according to the provisions of the fourth section of this act; and such person shall refuse or neglect to put in his answer to such bill in due time; a Court of Equity may make an order that such bill shall be taken *pro confesso*, unless the defendant shall, within eight days after being served with such order, shew good cause to the contrary.

If a defendant, having privilege of Parliament,

neglect to put in his answer, in due time, to a bill filed against him; a Court of Equity may order such bill to be taken *pro confesso*:

In the exposition of the 5th section of this statute, it has been held, (though the report of one case throws some doubt upon the subject (*c*),) that the remedy given by it is not confined to bills of discovery only, but extends, as seems reasonable, to bills praying relief (*d*).

and, it seems, the remedy is not confined to bills of discovery; but extends to bills praying relief.

By the 7th section of the same statute, (the substance of which now forms the 11th section of the consolidated bankrupt act (*e*),) it is enacted, that, when any decree, or order, shall have been pronounced, in any cause depending in the high Court of Chancery, or in the Court of Exchequer, or any order

If a decree, or order, for payment of money, shall have been pronounced by any Court of Equity, against any person within the description of the bankrupt

(*b*) Stat. 5 Geo. 4, c. 98.

(*d*) *Logan v. Grant*, 1 Mad.

(*c*) *Jones v. Davis*, 17 Ves. 626.

368.

(*e*) Stat. 5 Geo. 4, c. 98.

laws, but having privilege of Parliament; and such order, though duly served, is not obeyed;

the Court may fix a peremptory day for payment of the money; and if the party, being duly served with notice, neglect to pay the money, he is to be deemed a bankrupt; and any creditor may proceed against him as against any other bankrupt.

And if such privileged person, within one month after a summons sued

order shall have been made in any matter of bankruptcy, or of lunacy, against any person within the description of the statutes relating to bankrupts, but having privilege of Parliament, thereby ordering such person to pay any sum of money to any other person, or into the Bank, in the name of the Accountant General of the Court of Chancery, in trust; or to the proper officer (f) of the Court of Exchequer, in trust, if the cause is depending in that Court; then, if the party, having privilege of Parliament, shall disobey such order, the same having been duly served, the Court by which such decree, or order, shall have been pronounced, may fix a peremptory day for the payment of such money; and if such party, being within the description of the statutes relating to bankrupts, but having privilege of Parliament, being served with such order eight days before the day therein appointed for the payment of such money, shall neglect, or omit, to pay the same; then such person shall be deemed a bankrupt from the time of the service of such last mentioned peremptory order; and any creditor may sue out a commission against such person, and proceed thereon in like manner as against other bankrupts.

By the statute of 4 Geo. 3, c. 33, before mentioned, (which statute is repealed only to be incorporated in the general bankrupt act, of which it forms

(f) In the statute 45 Geo. 3, c. 124, the Deputy Remembrancer is named; but by the stat. 1 Geo. 4, c. 35, an Ac-

countant General is appointed, who is to keep the accounts of all monies held in trust for the suitors of the Court of Exchequer.

forms the 10th section,) the creditors of any person having privilege of Parliament, but coming within the description of the laws relating to bankrupts, may, upon an affidavit made of the debt, and filed, sue out a summons, or original bill and summons, against such debtor; who, unless within two months he pays, secures, or compounds for the debt, to the satisfaction of the creditor; or enters into a bond, in such sum, and with two such sufficient sureties as one of the judges of the Court out of which such process may issue shall approve, to pay such sum as shall be recovered in such action, shall be adjudged a bankrupt from the time of the service of such summons. And by the third section of the same statute of 4 Geo. 3, (now forming the 9th section of the consolidated bankrupt act,) it is enacted, that, if any trader shall commit an express act of bankruptcy, any of his creditors may sue out a commission of bankruptcy against him, under which commission he may be proceeded against in like manner as any other bankrupt; and privilege of Parliament to the contrary notwithstanding; except that such person shall not be subject to be imprisoned or arrested, during the time of such privilege, unless in cases of felony.

out against him for debt, do not pay, secure, or compound, the debt; or give bond, with two sureties, to pay such sum as shall be recovered against him; he will, if he come within the description of the bankrupt laws, be adjudged a bankrupt:

and any express act of bankruptcy, committed by a member of Parliament, authorises the like proceedings against him as against any other bankrupt.

For the preservation of the dignity and independence of Parliament, it is enacted, by the statute of 52 Geo. 3, c. 144, that, whenever a member of the House of Commons shall be duly declared a bankrupt, his right of sitting and voting in the said House of Commons shall be suspended for twelve months, unless within that period the said commission

If a member of the House of Commons be declared bankrupt, his right of voting in that House will be suspended for twelve months; unless, within that time, the commission be superseded, or

mission

the creditors satisfied their full debts;

or unless such bankrupt give bond, with two sureties, to pay the same, if recovered against him.

And such member's seat will be vacated, unless the commission be superseded within twelve months after it issued.

A member of the House of Commons must be served with an office copy of any bill filed against him, together with a *subpœna*; if he then refuse to appear, a sequestration will issue:

if such a privileged person abscond, a bill against him may be taken *pro confesso*.

The mode of

mission shall be superseded; or unless the creditors shall be paid, or satisfied, their full debts; provided, that any disputed debts, which such bankrupt shall enter in a bond, or bonds, with sufficient sureties, to pay, if they are by any proceeding in Law or Equity recovered against him, shall, for the purposes of this act, be considered as paid or satisfied. And, by the second section of the said statute, it is further enacted, that, if any commission of bankrupt, duly awarded against a member of the Commons' House of Parliament, shall not, within twelve months from the issuing thereof, be superseded, the commissioners shall certify the fact to the Speaker of the House of Commons, and thereupon the election of such member shall be held void, and his seat vacated.

When a bill in Equity is filed against a member of the House of Commons, he must be served with an office copy thereof, signed, together with a *subpœna*, after which, if he refuse, or neglect, to appear, he may be proceeded against by sequestration (g): which will not be discharged, till he has appeared, and paid the costs of the process (h).

And if a person having privilege of Parliament abscond, with a fraudulent design to elude justice, he may be proceeded against as any other individual; and the plaintiff's bill, as against such absconding party, may be taken *pro confesso*, under the statute of 5 Geo. 2, c. 25, which act contains no exceptions in favor of such privileged persons.

The mode of proceeding against defendants having

(g) 1 Harr. Ch. Pr. 111, edit. Newland.

(h) *Ibid.* 102.

ing privilege of Peerage, to compel them to put in answers to bills in Equity filed against them, is the same as that pursued, for the like purpose, against members of the Commons' House of Parliament; with this distinction, that, against Peers, spiritual or temporal, the writ of *subpoena* is not issued in the first instance; but a letter missive is directed to any such defendant, requesting him, or her, to order an appearance to be entered on his, or her, behalf. This mark of respect, however, is a mere compliment; or rather, it is not process upon which proceedings for a contempt can be founded; if the defendant fail to appear in due time after service of the letter missive, a *subpoena* must be awarded before the Court can proceed to sequestration (i). The letter missive is, however, not altogether inoperative in the plaintiff's behalf; for it gives his suit priority, and entitles him to receive the first answer, in case the defendant should file a cross-bill, after the service of such letter missive (j).

By an order of the House of Lords, dated 22nd May, 1732, it was declared to be the inherent right of all Peers, or Lords of Parliament, to answer, or be examined on interrogatories, in all Courts, upon protestation of honor only; and not on the common oath. This privilege, whilst it is a lofty, but not unbecoming, assertion of the claims of high rank to equally elevated notions of honor; can hardly be considered, even by the most jealous patriot,

compelling Peers to put in answers, is the same as that pursued with respect to members of the House of Commons; except that the writ of *subpoena* is not issued in the first instance, but a letter missive is directed:

upon which, however, no process of contempt can be founded; a *subpoena* must be awarded before sequestration:

but the letter missive will give the plaintiff's suit priority, if a cross-bill be filed.

All Peers, and Lords of Parliament, answer, and are examined on interrogatories, in all Courts, upon protestation of honor only; and not on the common oath.

(i) Hinde's Ch. Pr. 81.

(j) Price v. Lord Coningsby, Bunb. 123.

triot, as weakening, in any material degree, the security which their humbler fellow-subjects enjoy in dealings with patrician parties. If a nobleman could so far forget himself as to falsify his word, his oath would offer but a feeble additional guaranty.

A plaintiff at Law will not be allowed to avail himself of those means of delay which privilege of Parliament may afford him, as to putting in an answer to a bill for relief against the action.

If a person having privilege of Parliament bring an action, and the defendant at Law file a bill in Equity for relief against that action, an injunction will be granted, restraining proceedings at Law, till answer, or further order (*k*): otherwise the plaintiff at Law, by fraudulently availing himself of the means of delay in putting in his answer, which his privilege, to a certain extent, affords him, might obtain judgment against a party who had a clear equitable defence.

If exceptions be taken to a Peer's answer, and the Peer, to obtain an order for time, to put in a better answer, undertake, that, if the answer be not put in by the time limited, a sequestration shall go; this means a sequestration absolute:

but if, after sequestration *nisi*, an insufficient

Where a Peer has put in an answer to a bill in Equity, and exceptions have been taken, which have been submitted to; should the defendant apply for an order for time to put in a better answer; and, in order to entitle himself to the indulgence, enter an appearance with the Register, together with an undertaking, that, if the answer should not be put in, by the time limited, a sequestration shall go; this undertaking, upon a sound construction of Lord Rosslyn's General Order (*l*), will be understood to mean, a sequestration absolute; which process will, accordingly, issue forthwith (*m*). But where a sequestration *nisi* for not answering, has been granted against a Peer, if, before

(*k*) *Anonym.* 1 Vern. 329.

(*m*) *Gregor v. Lord Arundel*,

(*l*) Dated 23rd. Jan. 1794.
See Bea. Ord. in Cha. 455.

8 Ves. 88; *Portier v. De la Cour*, *ibid.* 603.

fore the order is made absolute, an insufficient answer be put in, this, it has been held, is good cause against such order *nisi*; and when that answer is reported insufficient, the plaintiff must commence entirely *de novo*, and move for a sequestration *nisi* (n).

answer be put in, the plaintiff, it has been said, must move anew for a sequestration *nisi*:

This latter rule, however, can only hold where the defendant has not come into terms, and given an undertaking that a sequestration should go.

if the defendant has not come into terms;

Lord Hardwicke thought, that, when an order *nisi*, had been made for a sequestration against a member of the House of Commons, for want of an answer; the proper medium would be, in case he put in an answer to which exceptions were taken, but not submitted to, to enlarge the time for shewing cause, until it appeared whether the answer was sufficient or not (o). The three last cited decisions are not irreconcilable, but may all stand together; though *Clifford's* case is the most questionable; if it be admitted doctrine, that, an insufficient answer is no answer (p).

but Lord Hardwicke held, that, the proper course would be, to enlarge the time, till it was seen whether the answer was sufficient, or not:

for, the general rule is, that, an insufficient answer is no answer.

If an officer of any Court, of Law or Equity, violate the privilege of Parliament by an arrest; though he may have acted under a mistaken impression, that, he was only doing a perfectly legal act; he must indemnify the party against all expenses occasioned by such arrest (q).

If an officer of any Court violate the privilege of Parliament by an arrest, he must indemnify the party.

A writ of *ne exeat regno*, to restrain a member of Parliament from going to *Ireland*, was refused by

A writ of *ne exeat* to restrain a member of Parliament from going to *Ireland*,

(n) *Lord Clifford's* case, 2 P. Wms. 385.

(p) *Attorney General v. Young*, 3 Ves. 209; *Davis v. Davis*, 2 Atk. 24.

(o) *Butler v. Rashfield*, 3 Atk. 739.

(q) *Anonym.* cited in 18 Ves. 3.

has been refused: by Lord Eldon (r); though his Lordship, in a subsequent case (s), said, he believed such writs had issued: possibly, in those instances, the parties against whom the preventive remedy was sought had not privilege of Parliament.

The journals of the House of Lords, delivered gratuitously to each Peer, are heir-looms.

It seems, that, the journals of the House of Lords, which are delivered gratuitously to each Peer, are heir-looms descending with the title; and cannot be retained by the deceased Peer's personal representatives (t).

If an information be filed to obtain payment of notes, given colorably to public uses, the relators cannot demur to a cross-bill, alleging, that, the notes were, in fact, given to obtain a corrupt return of members to the House of Commons:

If, with a corrupt view to influence the return of representatives to the House of Commons, promissory notes are given; but a colorable consideration be expressed, that, the money is given to public uses; should payment of the notes be refused, and an information be filed to obtain such payment; whereupon a cross-bill is brought against the relators, for a discovery of the real consideration of those notes; the relators, who introduced the question to the Court, cannot demur to the cross-bill; nor can they have any benefit from the information, if they will not give a discovery; though such discovery might subject them to a penalty (u).

but a demurrer will be allowed to a bill filed to recover the expenses of a petition to the House of Commons, against a return; which petition

If a Peer, seeking to establish an unconstitutional influence in a Borough, induce solicitors, by a promise of indemnification, to present a petition to the House of Commons, with a view to get his favored candidate seated there; but he subsequently

(r) *Bernal v. Marquis of Donegal*, 11 Ves. 43.

(s) *Howden v. Rogers*, 1 Ves. & Bea. 133.

(t) *Upton v. Lord Ferrers*, 5 Ves. 306.

(u) *Wildbore v. Parker*, Mosely, 126.

subsequently refuses to pay the charges so incurred: should the solicitors file a bill of discovery, in order to obtain evidence that they were so employed, for the purposes aforesaid; a demurrer will be allowed: for, in the first place, the discovery would be useless; since, if all the facts were proved, as stated, the plaintiff would, in an action at Law, be inevitably nonsuited. But, a still stronger ground for supporting the demurrer exists; if the discovery could be material, the case is one to which a Court of conscience would certainly give no assistance: the engagement is, professedly, made between two parties, to the injury and oppression of a third;—the candidate against whose return the petition was presented. This is maintenance; and it is impossible to sustain a bill for discovery, the effect of which, if allowed, would be to bring out a case of maintenance (*w*).

the plaintiff alleges he was induced to present by the defendant's promises to bear the expenses:

for a Court of Conscience will give no countenance to an agreement so founded on maintenance.

If judgment creditors of a member of the House of Commons, who have sued out *elegits*, bring a bill in Equity for a discovery of their debtor's freehold estates, charging, that, the defendant upon taking his seat as member of Parliament, gave in his qualification, as by Law is required, previously to the said judgments; and, that, if the estates constituting such qualification have been since conveyed away, it was without consideration, and in trust for himself: should the defendant meet the

A demurrer will not hold to a bill in Equity brought by a judgment creditor of a member of the House of Commons, for a discovery of his debtor's real estates;

(*w*) *Wallis v. Duke of Portland*, 3 Ves. 502; *Oliver v. Haywood*, 1 Anstr. 82; *May- or of London v. Ainsley*, 1 Anstr. 158.

but if it be stated, by answer, that, the qualification was not liable to execution, as being either copyhold, or a rent-charge; no further answer will be required.

Different consequences, when a colorable qualification for a seat in Parliament has been made use of;

and when such qualification has never been used.

the case, as to his qualification and fraudulent alienation, by demurer, which mode of defence admits the facts to be true, the demurrer must be overruled: but if he had, by answer, said, that, the property which he gave into the House of Commons was not liable to execution, as being either copyhold, or a rent charge, the Court would not have required a further answer (*x*).

If a deed, conveying a colorable qualification to sit in Parliament, or for any other purpose contrary to the policy of the Law, be complete, the party executing it cannot be heard to allege his own fraudulent purpose, in order to confine the operation of his deed within the limits of his intended fraud (*y*). But where a qualification was given, to enable a person to take a seat in the House of Commons, who never became a candidate; as no fraud was actually committed upon the policy of the Law, the grantee was restrained from suing upon the deed: it having been executed for a particular purpose, which never took effect (*z*).

(*x*) *Mountford v. Taylor*, 6 Ves. 792.

(*y*) *Cecil v. Butcher*, 2 Jac. & Walk. 572; *Curtis v. Perry*, 6 Ves. 747; *Birch v. Blagrove*, Ambl. 266: and see the head

of "Settlement and Conveyance."

(*z*) *Platamore v. Staple*, Cooper, 253; *Stratford v. Powell*, 1 Ba. & Bea. 21; *Roberts v. Roberts*, 2 Barn. & Ald. 369.

CHAPTER V.

Frauds in which Agents, Stewards, Brokers, Factors, or Receivers, are concerned.

THE conduct of persons entrusted, confidentially, with the management of property, is, upon obvious principles, liable to strict, and even severe, scrutiny in Equity. Thus, if an agent, though acting gratuitously (*a*), and solely with a view to the interest (as he conceives it) of his principal, exceed his commission; he makes himself liable for all the consequences. But, though such excess of authority is, in the first instance, at the risk of the agent; the principal, by subsequent approbation, adopts his agent's act, and takes the hazard upon himself (*b*). And this approbation will be inferred, whenever the principal avails himself of any advantage to be derived from the transaction (*c*): for he will not be permitted to avow his agent's negotiation as to part, and disavow it as to the rest (*d*). So, if an agent, factor, or receiver, trans-

Every agent, though unpaid and meaning fairly, responsible for any excess of his commission;

unless his principal, by subsequent approbation, adopts the act:

when this approbation, however, can be inferred as to part, it will be understood to apply to the whole.

And an agent

act

(*a*) *Charitable Corporation v. Sutton*, 2 Atk. 406; *Massey v. Banner*, 1 Jac. & Walk. 247.

(*b*) *Smith v. Cologan*, in note to 2 T. R. 189.

(*c*) *Clarke v. Perrier*, 2

Freem. 48.

(*d*) *Cornwall v. Wilson*, 1 Ves. Sen. 510; *Billon v. Hyde*, 1 Atk. 128; *Wilson v. Poulter*, 2 Str. 861.

who transacts business in the usual manner, not answerable for any loss; unless fraud be shewn.

But, a severe scrutiny exercised when a fair suspicion exists, that an agent has taken improper advantage of his confidential situation.

Subject to jealous examination, an open purchase by an agent from his principal may, in some cases, be supported:

but, there must be no delusion, by setting up a nominal vendee, when the agent is the real purchaser.

act business for his employers in the regular and usual manner; notwithstanding it may appear, that, under the circumstances, a more advantageous course might have been pursued, yet, if no fraud appear, the agent will not be answerable for any loss sustained (e) But, whenever a fair, reasonable, judicial, doubt exists, whether a party has not availed himself of the opportunities of a confidential situation, in order to obtain some selfish advantage; it would be too dangerous, considering the relation between the parties, to allow a transaction of that suspicious nature to stand (f).

An agent, subject to a strict and jealous investigation of the transaction in Equity, may, as it has been held in modern cases, buy from his principal; if the latter, being fully informed who is the proposed purchaser, and, labouring under no influence or deception, is willing to sell to him (g): but it cannot be suffered, that an agent should contract clandestinely, setting up a nominal vendee, and dealing with his own employers in the name of that person. The employers are, thus, thrown off their guard; they are led to suppose they have an agent acting solely with a view to their interest; endeavouring to get the best price for them: while, in fact, the agent is contracting with himself; and fixing the price which he is himself

(e) *Knight v. Earl of Plymouth*, 1 Dick. 125; *Belchier v. Parsons*, 1 Keny. Rep. 47: see *Wren v. Kirton*, 11 Ves. 381; *Massey v. Banner*, 1 Jac. & Walk. 247; and *post*, p. 158.

(f) *Lady Ormond v. Hutch-*

inson, 16 Ves. 107; *Huguenin v. Baseley*, 14 Ves. 299; *Oliver v. Court*, 8 Price, 161, 164.

(g) *Morse v. Royal*, 12 Ves. 373; *Gibson v. Jeyes*, 6 Ves. 277.

self to pay. To call this a contract, indeed, would be an abuse of terms; it is, in Equity, a mere nullity: to a contract there must be two parties (*h*). Lord Thurlow, seems, even, to have been clearly of opinion, that, a person employed to sell could not, under any circumstances, possibly be permitted to buy: that, the principle must prevail, even if he bought fairly: and that, such a purchase could not be supported, although it was made with the knowledge of the party selling (*i*). And, as an agent cannot, at any rate, purchase from his employer except under the restrictions above specified; so, it would be equally opening a door to "monstrous fraud," to use Lord Rosslyn's strongly expressive language, if an agent were allowed to be himself the seller of articles, which he was employed to procure for his principal. The clearest evidence of consent would be necessary to support such a transaction (*k*).

Lord Thurlow would not permit a person employed to sell, to become the purchaser, under any circumstances.

An agent must not be himself the seller of articles which he is employed to purchase:

Upon these principles, it has been decided, that, if a person make himself really a principal, in those very transactions in which he is, ostensibly, concerned as a broker; he can maintain no suit either at Law or in Equity in respect of those transactions: a broker is the agent of the buyer, or seller, or both; bound to exercise his skill in favor of those who, for that sole purpose, have confidentially employed him: but if he were allowed to introduce himself as a principal, his duty and

for no man must make himself a principal in those transactions in which he ostensibly acts as agent.

(*h*) *Woodhouse v. Meredith*,
1 Jac. & Walk. 222.

(*k*) *Massey v. Davies*, 2 Ves.
Jun. 321; *Attorney General v.*

(*i*) *Crowe v. Ballard*, 3 Br.
120.

Cochrane, Wightw. 14.

and his interest would be set in decided opposition (*l*).

Where an agent, employed to sell, has purchased for himself, and is dead; his estate will be liable to account for the full value of the purchased property; for this is not such a *tort* as dies with the person:

And not only where an agent, employed to sell estates, becomes himself the purchaser, (whether in his own name, or that of another,) will Equity charge him with the actual value of the estates; but, also, whenever such agent has, from partial or corrupt motives, let part of his employer's estate, at a less rent than he could have obtained from a responsible tenant; the agent's estate must, though he be dead, make good the loss sustained. For though, at common Law, an action sounding in *damages* dies with the person; the ground of jurisdiction in Equity is, that, in such case, it is debt (*m*): and, hard as it may be upon persons who succeed to property liable to demands of this nature, that the fraud was not discovered till after the death of the party implicated in it; yet there is a fixed principle which, in general cases, authorizes a Court of Equity to say, that, there can be no period, however remote, through which the Court will not look for the purpose of setting right a steward's accounts (*n*).

and no lapse of time, alone, will prevent a Court of Equity from setting right a steward's accounts.

An agent's accounts should be always ready; and he cannot privilege the books in which they are entered, by inserting therein distinct matters.

An agent cannot privilege the books in which his accounts as agent are kept, by inserting in them entries on other subjects; the parts which do not concern his principal he may seal up, pledging himself, on oath, that he has sealed up those parts

(*l*) *Lowther v. Lowther*, 13 Ves. 103; *Wren v. Kirton*, 8 Ves. 502; *Ex parte Dyster*, in *re Molinc*, 1 Meriv. 172; *S. C.* 2 Rose, 355: and see *infra*, p. 157.

(*m*) *Lord Hardwicke v. Vernon*, 4 Ves. 416, 418: see *post*, p. 156.

(*n*) *Earl of Hardwicke v. Vernon*, 14 Ves. 511; *Middle-ditch v. Sharland*, 5 Ves. 91.

parts only: but where the books are not proved to be in daily use, in the course of general trade, the principal will not be put to the inconvenience of attending at the residence of the agent, for the purpose of examining those accounts, which the latter ought to be prepared with; the proper order is, that, the agent shall leave with his clerk in Court his books of accounts and vouchers relative to the matters in question, and that the principal, his clerk in Court, or solicitor, shall be at liberty to inspect, and take copies of the same; but that the agent shall be permitted to seal up, on oath, such parts of the said books, &c., as do not in any way relate to the affairs of his principal (*o*).

Rules as to production of books of accounts.

To have his accounts always ready and clear, is the very first duty of an agent, receiver, or other accounting party (*p*): and this not only by having vouchers ready for his payments, but, also, by being prepared, as his employers have a right to expect, with accounts of his receipts (*q*).

Vouchers for payments, and accounts of receipts, must be alike forthcoming.

If receivers neglect to pay in their balances regularly, they will be charged with interest; whether they have made any, or not (*r*): or they may be proceeded against personally, by commitment (*s*). As a general principle, a person who accepts the office of trustee engages to do the whole duty of receiver, without emolument. If, however, the appointment

Rules as to receivers.

(*o*) *Gerard v. Penswick*, 1 Ves. 369.
Swanst. 535.

(*p*) *Pearse v. Green*, 1 Jac. & Walk. 140; *Lord Chedworth v. Edwards*, 8 Ves. 49; *Morgan v. Lewes*, 4 Dow, 52.

(*r*) *Potts v. Leighton*, 15 Ves. 273: and see the General Order on this subject, 15 Ves. 278.

(*s*) *Davies v. Cracraft*, 14

(*q*) *White v. Lady Lincoln*, 8 Ves. 143.

appointment of a receiver become necessary, the Court looks to the trustee to examine, with an adverse eye, whether the receiver does his duty.

Trustee rarely appointed receiver: nor is an infant's next friend a proper person.

The consequence is, the appointment of a trustee to be also receiver is an extremely rare case; and only where he will act without emolument: unless no one else can be procured who is so well able to manage the estate (*t*). And, as it is the duty of the next friend of an infant suitor to watch the accounts and conduct of the receiver of the rents and profits of the infant's estate; the two characters are, obviously, incompatible, and must not be united; or gross fraud might be practised, and pass undetected (*u*). Upon a similar principle, as a receiver is to account to, and be superintended by, the Master to whom the cause is referred, policy and justice require that they should be unconnected; and that the receiver should be proposed by the parties interested, not nominated by the Master; unless the proper parties neglect, for an unreasonable length of time, to propose any one for that office (*w*).

The Master to whom a cause is referred ought not to nominate a receiver.

Members of Parliament not the most eligible receivers:

Members of Parliament are not absolutely disqualified from acting as receivers; but as the process against them, in case of default, is more difficult than against others, they are not so eligible as men of equal substance who are not in Parliament. And as a barrister, in practice, cannot be expected

nor practising barristers.

(*t*) *Sykes v. Hastings*, 11 Ves. 364; ——— *v. Jolland*, 8 Ves. 72; *Anonym.* 3 Ves. 516; *Sutton v. Jones*, 15 Ves. 588.

(*u*) *Stone v. Wishart*, 2 Mad.

64: see, under the proper head, as to receivers of the estates of Lunatics.

(*v*) *Attorney General v. Day*,

2 Mad. 256.

expected to give personal attention to the estate; he is not well fitted for the office of receiver; though he might be a most proper auditor (α). The judgment of the Master, in the selection of a receiver, is never disturbed, except upon very special grounds (γ); but, still it is not absolutely conclusive (z).

The Master's selection not easily disturbed.

A receiver runs a risk, who lays out money without a previous order of the Court; but when, on reference to the Master, the expenditure is found to have been beneficial to the estate, he may be allowed it in account (d). A receiver may be appointed upon an estate in the East Indies; but, as a receiver in India would be out of reach of the jurisdiction here, some person resident in this country should be the receiver, who may appoint his own agent in India (b).

Expenditure by receivers, without order.

Receiver of an estate in India.

Where an agent has been employed for the purpose of making a sale; the principal may, in all cases, file a bill for an account against such agent (c): and an agent must account, not only for property received, but, also, for any interest, or profit, he has made of it (d): unless this has been done with the acquiescence of his principal, duly informed of all the circumstances (e). If

The principal may, in all cases, file a bill against an agent, employed to sell, for an account, including interest.

(x) *Wynne v. Lord Newborough*, 15 Ves. 284.

(b) ——— v. *Lindsey*, 15 Ves. 91.

(y) *Tharpe v. Tharpe*, 12 Ves. 320; *Greuzè v. Bishop of London*, 2 Br. 256.

(c) *MacKenzie v. Johnston*, 4 Mad. 375; *Massey v. Banter*, 4 Mad. 417.

(z) *Wynne v. Lord Newborough*, *ubi supra*.

(d) *Brown v. Litton*, 1 P. Wms. 141.

(a) *Tempest v. Ord*, 2 Meriv. 36; *Blunt v. Clitheroe*, 6 Ves. 801.

(e) *Beaumont v. Boulbee*, 11 Ves. 358; *Lord Salisbury v. Wilkinson*, cited, 8 Ves. 48.

An agent who has obtained a grant from his employer, improperly, cannot retain it himself, nor can a purchaser from him, who had notice of the facts: no ratification procured by the agent, whilst his fiduciary situation continues, will avail: for, one fraudulent deed cannot set up another.

If an agent, by an abuse of confidence and misrepresentation, obtain a grant from his employer; such grant will be set aside, not only as against the grantee, but against a purchaser for valuable consideration from him, if such purchaser had notice of the facts: and although the agent procure, subsequently to the grant, a further conveyance; whilst the fiduciary relation between him and his employer continues to subsist, and the grantor remains in ignorance of his rights; such subsequent transaction is merely a continuation of the fraud,—and not a confirmation; to make it available as such, it must be shewn, that, the grantor knew the transaction, which he was confirming, to be impeachable; and, that, with this knowledge, he freely and spontaneously executed the deed (*f*); for one fraudulent, or illegal deed cannot set up another (*g*).

A conveyance obtained by the undue influence of one holding a confidential relation, can, at most, only stand as a security for real demands.

So, where a fair inference arises, either of ignorance on the one side as to the extravagant nature of the transactions; or, of undue and overbearing influence on the other part; no conveyances obtained from a weak and distressed party, by a person standing in a confidential relation, can be supported as more, at the utmost, than securities for any balance which may be due on the account between the parties. Nor, (though *laches* may, sometimes, protect from impeachment transactions, originally of a very questionable nature),

Laches not imputed, whilst a party is under influence.

can

(*f*) *Chesterfield v. Jansen*, 317; *Murray v. Palmer*, 2 Ves. Senr. 146; *Dunbar v. Sch. & Lef.* 486.

Tredennick, 2 Ba. & Beat. 314, (*g*) *Roche v. O'Brien*, 1 Ba. & Beat. 340.

can acquiescence be imputed, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate (*h*). And in considering whether an agent can be allowed the benefit of any voluntary settlement obtained from his employer, before the connexion between them was absolutely dissolved; it will be necessary to ascertain clearly, not only that such settlement was the pure, uninfluenced, well understood act of the employer's mind; and that he executed the instrument with that full knowledge of all its effects, nature, and consequences, which it was the duty of the agent to communicate (*i*); but a farther question will be, (not merely whether the party making the settlement knew what he was doing, but) how that intention was produced? with reference to which the pecuniary circumstances and transactions between the parties must be attended to (*k*). And though old age, alone, will not justify a presumption that the party was imposed upon (*l*); yet it will have some weight, in estimating the fairness of a gift, to persons in whom the aged party confided (*m*).

In examining gifts from an employer to his agent, Equity will inquire, not only if they proceeded from the free and well understood acts of the employer's mind, at the time; but,

also, how that intention was produced.

Old age, alone, affords no presumption that such a party was imposed upon: but is of some weight in estimating the fairness of a gift.

The property of a principal, entrusted by him to his factor, for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in point of form;

A principal may follow property entrusted by him to his factor, notwithstanding any

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(*h*) *Purcell v. Macnamara*, Ves. 800.

14 Ves. 106, 121, 122.

(*i*) *Harris v. Tremenheere*, Jun. 19.

13 Ves. 40.

(*k*) *Huguenin v. Baseley*, 14 Mad. 192.

(*l*) *Lewis v. Pead*, 1 Ves.

(*m*) *Griffiths v. Robins*, 3

change of form it may have undergone, provided it can be clearly traced, and distinguished.

so long as it is capable of being traced, and clearly distinguished from all other property: and property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it would be from the factor himself before his bankruptcy (n). It being well established, then, as a general principle, that, if property in the hands of any agent, in its original state and form was covered with a trust in favor of the principal, no change of that state and form can divest it of such trust: or give the agent, or those who represent him in right, any more valid claim, with reference to it, than they, respectively, had before such change; the only difficulty as to the extent in which this rule is applicable to any particular case, must be a difficulty of fact, not of law.

When property may be so distinguished, although it has been converted into specie.

For instance, the property may have been converted into specie; and money, according to a quaint, but favorite, phrase, has no "ear mark;" but this can only be predicated of an undivided and undistinguishable mass of current coin: money kept apart from other money, and capable of being distinguished, may be followed specifically into the hands of an agent, or into those of his general legal representatives (o). And whenever an agent mixes the property of his principal with his own, the whole must (as against the agent), both at Law and in Equity, be taken to be the property of the principal,

And, as against an agent who mixes his employer's property with his own, a Court of Equity

(n) *Ex parte Dumas*, 2 Ves. Sen. 586; *Ex parte Emery*, 2 Ves. Sen. 674; *Godfrey v. Furzo*, 3 P. Wms. 186: and see further, under the head of

"Trust." See, also, the recent statute of 4 Geo. 4, c. 83, s. 3.

(o) *Taylor v. Plumer*, 3 Mau. & Sel. 574, 575.

principal, until the agent puts the property again into such a situation that it may be distinguished, as satisfactorily as it might have been before that unauthorized mixture. The application of this doctrine, however, is not left to the discretion of the Master in taking the accounts between the parties; but is kept under the direction of the Court, which will, itself, judge whether the case calls for it (*p*).

Though, in general, mere inadequacy of price, if not so gross as plainly to demonstrate fraud (*q*), will not vitiate a sale (*r*); yet, if the purchaser be the agent of the vendor, the adequacy of the consideration will be more jealously scrutinized; such a purchaser must at least shew, with indisputable clearness, that, he furnished his employer with all the knowledge which he himself possessed (*s*): or which he might, by due diligence, have acquired, as to the value of the subject of sale (*t*). For in order to set aside a purchase of an undervalue by an agent from his employer, or by a creditor who takes advantage of the circumstances of his debtor, it is not necessary that fraud, in the broad sense of the word, should be proved; it is enough if that constructive fraud, upon which a Court of Equity acts and grants relief, be established (*u*).

may hold the whole to belong to the employer.

Inadequacy of price, if not so gross as to afford inference of fraud, will not vitiate a sale generally; but, if the purchaser be the agent of the vendor, the transaction will be strictly scrutinized:

in such a case, constructive fraud will be enough to set the sale aside.

(*p*) *Lupton v. White*, 15 Ves. 436, 442; *Lord Chedworth v. Edwards*, 8 Ves. 50. How far the case is varied if the agent becomes a bankrupt, see the appropriate head of this treatise.

(*q*) *Darley v. Singleton*, Wightwick, 29; *M'Namara v. Brown*, 2 Ba. & Beat. 8.

(*r*) *Smyth v. Smyth*, 2 Mad. 92; *Ord v. Noel*, 5 Mad. 440.

(*s*) *Lowther v. Lowther*, 13 Ves. 105.

(*t*) *Wren v. Kirton*, 8 Ves. 502; *Ex parte James*, 8 Ves. 347.

(*u*) *Medlicott v. O'Donnell*, 1 Ba. & Beat. 165.

An agent who pays money, belonging to his principal, into his own banking-house, and to his own account, is responsible for its safety:

more especially when he has been receiving interest upon the deposit so made.

If an agent, by misrepresentation, induce his employer to grant a lease upon very inadequate terms, the lease cannot stand, although the lessee may have been guilty of no fraud on his part:

and where there has been collusion, in fraud of

If an agent, even one acting gratuitously, pay monies, belonging to his principal, into his own banking house, and to his own account; should the bank fail he will be responsible to his principal: for, if he himself had become a bankrupt, his assignees would have taken the debt appearing to be due to him from the bankers; and if he had died insolvent, the money would have been part of his assets: as his estate, therefore, might, under these circumstances, have had all the benefit of the property; he will, on the other hand, be compelled to make good any loss sustained in consequence of his having chosen to make such a disposition of the money: the case will, of course, be still stronger, when he has been receiving interest upon the deposit. This would be a plain fraud, if he omitted to furnish his principal with explicit particulars, enabling him to call for his fair proportion of interest (*w*).

If a lease be obtained from the steward, or other agent, of the lessor, by means of any misrepresentation, whereby the lessee (even innocently on his part), gains any advantage over the lessor; the lease cannot stand: and if it be proved that the agent was conscious of the real facts, he will be answerable to his principal for any loss, sustained in consequence of the concealment of that which it was his duty to have communicated to his employer (*x*). So, if a stranger enter into a fraudulent bargain with a servant, acting on behalf of his master;

(*w*) *Massey v. Banner*, 1 Jac. & Walk. 248, 250.

(*x*) *Lord Abingdon v. But-*

ler, 1 Ves. Junr. 208: see *ante* p. 148.

ter; or if a servant, by collusion, take greater profits than belong to his office; in either case, an account of the gains made by such fraud cannot be resisted (*y*). And, when a factor, instead of charging factorage upon purchases made for his employers, deals with them as a merchant, and charges mercantile profits; that is a fraud, upon which a Court of Equity will decree an account: or, if such factor, or broker, be also a manufacturer, though he might, by a rigid adverse bargain, demand what price he thought fit for his goods; yet if, by taking advantage of his character of factor, or broker, and of the confidence reposed in him as such, he obtain a price he ought not to have had; that, also, is good ground for an account (*z*).

a principal, an account, at his suit, cannot be resisted.

When a factor charges mercantile profits, instead of factorage, his employers may compel him to account, in Equity.

When an agent, known to be acting as such, gives an order on account of the concern of which he has the management, he thereby incurs no personal responsibility: and if, in payment for the articles supplied by his order, he hand over a bill of exchange, which turns out to be mere waste paper; the creditor, unless he has purchased the bill out and out, has a right to resort to his original debt, against the principal for whose use the articles in question were furnished (*a*).

When a known agent gives orders on account of a concern of which he has the management, the principal alone is responsible for payment.

A charge by a bill-broker in the country for commission, if made *bonâ fide*, and not colorably, with a view to evade the statute, is not usurious (*b*).

A bill-broker in the country may charge commission.

A

(*y*) *East India Company v. Henchman*, 1 Ves. Junr. 289.

(*a*) *Tempest v. Ord*, 1 Mad. 91.

(*z*) *East India Company v. Keighley*, 4 Mad. 35: and see *suprà*, p. 148.

(*b*) *Ex parte Henson*, 1 Mad. 115; *Baynes v. Fry*, 15 Ves. 121.

A mandate from a principal to his agent may be revoked, at any time before the agent has entered into a binding agreement to execute it, in favor of a third person.

A mandate from a principal to his agent, can give no right or interest to a third person in the subject of such mandate. It may be revoked at any time before it is executed; or, at least, before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with its execution (c).

Reasonable care, alone, is to be required from agents;

but where their culpable negligence has led to ultimate loss, they must make it good; although the proximate cause of loss may have been out of their control.

Agents who have used reasonable care with respect to their employers' goods, are not responsible for any inevitable accidents, by which they may be destroyed, or injured (d): but, no one intrusted with another's property can claim to be exempted from responsibility for its destruction, merely from the circumstance, that, the loss has ultimately happened by means which could not be controlled. Though the loss happen by fire, lightning, or other similar accident, that will be no excuse, if the agent appear to have been guilty of previous negligence, which led to, though it was not the direct and immediate cause of such loss (e).

A factor who charges his employer with premium of insurance, though none is made, must himself answer as insurer:

as he must, if, after he has accepted an order to

If an order be sent by a principal to a factor to make an insurance, and the principal is charged, in account, as if it were made; the factor, though he never, in fact, made that insurance, is, in Equity, considered as the insurer himself (f). And where a merchant here has, in the usual course of business, accepted an order from a foreign correspondent

(c) *Scott v. Porcher*, 3 Mer. 664.

(d) *Co. Litt.* 89, a. *Anonym.* 2 *Mad.* 100: and see, *ante*, p. 146.

(e) *Caffrey v. Darby*, 6 Ves. 496.

(f) *Tickell v. Short*, 2 Ves. Senr. 239.

pondent to insure; but limits his broker to too small a premium, in consequence of which no insurance can be procured; the merchant here is liable to make good any loss sustained by his correspondent (*g*). A person who has effected an insurance as agent, cannot dispute the claim of his only known principal, on the ground that other persons are interested in the subject matter of the insurance: any such claims must be settled between the parties making them and the party in whose name the insurance was effected; the agent is estopped from denying the right of his principal (*h*).

insure, the insurance be not made, owing to his mismanagement.

A person who has effected an insurance as agent, cannot dispute the claims of his only known principal, on the ground that other parties are interested in the subject of insurance.

It has been repeatedly determined (though Lord Keeper North was not satisfied with the principle (*i*), which, in truth, seems very questionable); that, a factor is entitled to all the advantage which he can make by evading the payment of foreign customs (*k*): but however this may be, it is clear, that, such a rule cannot apply to home duties; for there can be no custom of merchants grounded on a fraud to the King (*l*).

Whether a factor is, or is not, entitled to any advantage made by evading payment of foreign customs; he clearly can set up no claim in respect of a fraud upon home duties.

If a man, bound by contract to supply one article, send another; under such circumstances, that it can neither be returned, nor absolutely rejected, without great loss arising; the vendee has a right, even at common Law, to consider himself not as a purchaser,

In what case a vendee has a right to divest himself of the character of purchaser, and act as the agent of the vendor.

(*g*) *Wallace v. Telfair*, 2 T. B. 188, note.

Ca. 76; *Smith v. Oxenden*, 2 Freem. 173.

(*h*) *Roberts v. Ogilby*, 9 Price, 285.

(*i*) *Borre v. Vards*, 2 Freem. 174; *Papillon v. Hix*, 1 Cha.

(*j*) *Anonym. Skinner*, 149.

Ca. 258.

(*k*) *Knipe v. Jesson*, 1 Cha.

a purchaser, but as the agent of the vendor; and he may sell the goods on the consignor's account (*m*).

Delay in making claims, is an objection of less weight when urged by an agent, in bar of the rights of his principal, than in any other case.

Long delay in bringing forward even the justest claims, may, in many cases, bar the title to relief; but it is, at least, very difficult for a confidential agent and steward to impute neglect to his employer; whose negligence it is his duty to guard against with respect to all his transactions, but more particularly as to all those in which he, the agent, is concerned. For it is his duty to render an account, and a fair account, to his principal; and distinctly to apprise him of the whole of his rights. Length of time weighs less in such a case than in any other (*n*). No doubt, a man holding the relation of agent, or steward, to another, may put himself altogether into an adverse situation, divesting himself of the character of agent: and, if he so deal as to make it not possible to state, that, any confidence was reposed in him; he will not continue subject to the peculiar responsibilities which attach on confidential situations: but the question will be, whether, when dealing with his employer, he has, distinctly, placed himself in an adverse situation (*o*)?

Settled accounts not opened, unless specific errors are charged by the plaintiff's bill:

It is, however, a general, and most material, rule, in all cases of accounts, that, where there has been a settlement, and the account has either been signed, or a security executed on the foot of it; a

Court

- (*m*) *Kemp v. Prior*, 7 Ves. 247. *v. Cowley*, 4 Price, 103.
 (*n*) *Beaumont v. Boulton*, 5 Ves. 492, 494: and see, *Milnes*
 (*o*) *Beaumont v. Boulton*, on appeal, 7 Ves. 609.

Court of Equity will not open that transaction, unless the evidence produced (and that evidence founded on charges in the plaintiff's bill) shew the transaction to be so iniquitous, that, it ought not to be brought forward at all to affect the party sought to be bound. If the account impeached be a settled account, the Court expects the errors to be specified in the bill, and to be proved as specified; otherwise it would be easy to overturn the fairest accounts, if of a complicated nature (*p*). To this general rule, however, there is one, obviously equitable, exception: if it appear on the face of the account, by the agent's own admission, that he has not given his employer credit, for what is acknowledged to be due; the necessity for pointing out specific errors by the bill can hardly exist (*q*). The reason of the rule ceasing, the rule itself will not be called into operation. Fraud, of course, will be a sufficient ground for opening a settled account; and though positive fraud may not be distinctly proved, yet it may be inferred from an improper manner of taking the accounts: for instance, it would be extremely dangerous if accounts settled between two stewards, without vouchers produced, should, as against their respective principals, be deemed settled accounts: and a Court of Equity would certainly give leave to surcharge and falsify such accounts (*r*).

unless it appear, on the face of the account, that an agent has not given credit for sums admitted to be due.

Settled accounts may be opened, when fraud is reasonably to be inferred from the mode of taking the accounts; although no facts of positive fraud be distinctly proved.

In many cases, in which an action of *assumpsit* would

Transactions between princi-

- (*p*) *Drew v. Power*, 1 Sch. Ves. 125.
 & Lef. 192; *Chambers v. Goldwin*, 9 Ves. 266. (*r*) *Beaumont v. Boulbee*, 7 Ves. 617.
 (*q*) *Matthews v. Wallwyn*, 4

pal and agent being coupled with a trust; a bill in Equity will hold in many cases where *assumpsit* would also lie at common Law :

for matters of intricate account, especially where there are reciprocal demands, can be best settled under the cognizance of a Court of Equity.

Agents must account for any interest made on money belonging to their principals.

would lie against an agent, as for money had and received on account of his principal, a bill in Equity will also hold; upon the ground that such transactions are coupled with a trust. So, if money be advanced to an agent, for the purpose of making a particular purchase; though an action at Law will lie for money had and received; if the specific object be countermanded, or shewn to be at an end (*s*); a bill in Equity, treating such agent as a trustee, and praying that he may be decreed specifically to perform the trust, if practicable, or otherwise account for the money, may also be sustained (*t*). Indeed, whenever matters of account are at all intricate, they are more properly cognizable in Equity than at Law: as the plaintiff may, in a Court of Equity, have a discovery of books and papers, and the advantage of the defendant's oath. And, especially where there have been mutual dealings, and consequently reciprocal demands, these are best examined, so as to do complete justice to all parties, before a Master; who can make to each all due allowances: should any doubt arise as to a particular demand, to ascertain the justice of which would be more properly the province of a jury, an issue may be directed (*u*). Agents, whether for the Crown or for individuals, are, *prima facie*, not entitled to put into their own pockets any interest they may have made upon sums

(*s*) *Case v. Roberts*, Holt's N. P. C. 501; *Taylor v. Lendey*, 9 East, 53.

(*t*) *Scott v. Surman*, Willes, 405.

(*u*) 1 Equ. Ca. Ab. 5, in margin; *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *Corporation of Carlisle v. Wilson*, 13 Ves. 278.

sums paid into their hands, on account of their employers: they must shew a special case to exempt themselves from the general rule, that, as between agent and principal, the latter is not only entitled to money received, on his account, by the former, but, also, to the fruit derived from it (*w*).

A principal cannot, it seems, recover from his agent sums received in respect of illegal transactions; at least, where the demand can only be made out through the medium of an agreement as to such illegal transactions; though it might be possible to sustain a *collateral* demand, even of this questionable origin: as, for instance, if the proceeds had been paid over in trust for the principal, to a third person, not a party to the illegal transaction; a Court of Equity would not allow him to set up that objection, as a reason for not performing his trust (*x*). So, an executor to a smuggler, on being called to account for the estate of his testator, endeavoured to avoid a considerable part of the account, by saying, that, it related to smuggling transactions; but the executor was not allowed to set up this as a defence against creditors and legatees. The smuggler could not, it was held, have been sued, himself, in respect of demands arising out of such illegal dealings; but the *tort* died with him; and could afford no justification

It seems, that, a demand solely depending upon an agreement as to illegal transactions cannot be maintained:

but a collateral trust may arise, affecting the proceeds of such transactions, which trust must be executed.

Distinction, where the question is agitated between parties to the illegal proceedings, and where the claims of innocent persons intervene.

(*w*) *Crawford v. Attorney Russell*, 1 Bos. & Pull. 296; *General*, 7 Price, 78. *Tennant v. Elliot*, *ibid.* 3; that

(*x*) *Thomson v. Thomson*, 7 Ves. 473: and see *Farmer v. Law*. the rule is the same at common

fication of fraud on the part of his executor (*y*). And a bill, for an account of profits made by an illegal partnership, has been dismissed; as not being a fit subject for an account in Equity (*z*).

Where the legality of a transaction comes in question, it seems most proper to take the opinion of a Court of Law, before decreeing an account in Equity: whether the transaction be *malum in se*, or only *malum prohibitum*.

Wherever, indeed, the legality of a contract between an agent and his employer comes in question, it seems most proper to take the opinion of a Court of common Law; by directing a case, before decreeing an account (*a*). Not only where a transaction is *malum in se*, but, where it is merely *malum prohibitum*, a contract relative thereto will, (according to what seems the preferable opinion), receive no aid from Equity (*b*): and, a debt incurred in the course of dealings contrary to Law, cannot be proved under a commission of bankrupt (*c*).

Sir William Grant's opinion;

And Sir William Grant, also, has decided, that, profits made in the course of dealings prohibited by Law cannot be the subject of account in Equity (*d*); expressly disapproving the case in which

Lord Rosslyn's;

Lord Rosslyn, however, held, (what cannot now be implicitly relied upon), that, although a Court of Equity would not execute an illegal contract; yet, that, where the parties have had dealings together upon a variety of transactions, and a general account is sought; it would be unjust not to bring

(*y*) *Joy v. Campbell*, 1 Sch. & Lef. 339.

Richardson, 3 Meriv. 470: but see *Ex parte Bulmer*, 13 Ves.

(*z*) *Knowles v. Haughton*, 11 Ves. 168.

316.

(*a*) *Ex parte Daniels*, 14 Ves. 193.

(*c*) *Ex parte Mather*, 3 Ves. 373; *Ex parte Bulmer*, 13 Ves. 320.

(*b*) *Ottley v. Browne*, 1 Ba. & Beat. 364; *Aubert v. Maze*, 2 Bos. & Pull. 375; *Evans v.*

(*d*) *Knowles v. Haughton*, 11 Ves. 169.

bring into that account any profit or loss, made even upon a course of smuggling transactions (*e*). Lord Erskine, it is true, thought it much too large and general a proposition to say, that, when a plaintiff cannot open his case without shewing that he has broken the Law, a Court of Equity will not assist him (*f*). It should be recollected, however, that, the cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, upon which Lord Erskine relied, have been, both before and since, repeatedly doubted; if not absolutely overruled (*g*): And, of course, together with his premises, his Lordship's deductions (so far as they were solely dependent thereon), must also fall.

and Lord Erskine's.

Cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, much shaken.

An infant may be charged in trover, for that is a *tort*; but he cannot be compelled to account as factor, or agent: whenever a minor is employed, therefore, in such capacities, security for the performance of his duties should be taken, from persons competent to bind themselves by contract (*h*). It is a general rule, at common Law, that, where the cause of action is a *tort*, arising *ex delicto*, and supposed to be *by force*, and against the *king's peace*; there a personal action dies with the person; for by injuries of this sort the offender acquires no gain to himself. But, where, besides the

A minor cannot be compelled to account as factor or agent.

Where, besides

(*e*) *Watts v. Brooks*, 3 Ves. 193; *Cannan v. Bryce*, 3 Barn. 613; but see *Langton v. Hughes*, 1 Mau. & Sel. 596; *Ex parte Bell*, *ibid.* p. 757. & Ald. 183; *Aubert v. Maze*, 2 Bos. & Pull. 374; *Mitchell v. Cockburne*, 2 H. Bla. 381.

(*f*) *Ex parte Bulmer*, 13 Ves. 316.

(*h*) *Smalley v. Smalley*, 1 Eq. Ca. Ab. 6.

(*g*) *Ex parte Daniels*, 14 Ves.

the criminal offence, property is acquired by a *tort*, and the offender dies, relief may be had against his executor.

A bill for an account lies against the representatives of a deceased factor: but, if a joint factor survive, relief may be sought against him alone.

Wherever trover would lie at common Law, the case must also be within the cognizance of Equity: and when conversion, in the strict legal sense, cannot be established, relief can only be had in Equity:

the crime, property is as acquired by the offender, there, an action for the value of the property will survive against his executor (*i*). *A fortiori*, relief, in such cases, may be had in a Court of Equity (*k*); where it is held, that, although an action sounding in damages dies with the person, yet, a fraudulent gain made by such *tort* is a debt, upon which the jurisdiction in Equity attaches (*l*). In conformity with this principle, a bill for an account will lie against the executors, or administrators, of a factor (*m*); but, notwithstanding this, and although the *jus accrescendi* does not take place between merchants, a surviving factor may be compelled to account, not only for his own receipts, but for those of his co-factor also (*n*): as, on the other hand, the survivor alone can sue at Law, in respect of such factorship; but, on recovery, he must account with the executor of the deceased co-factor for a moiety of the sum recovered (*o*).

Wherever trover would lie at common Law, the case must be one proper for Equity to deal with; and as conversion, which is the *gist* of an action of trover, can only be established where the plaintiff had the strict legal property; in all cases resting on agreement, or trust, relief can be had in Equity only. When, therefore, a party has agreed to

(*i*) *Sherrington's case*, Saville, 40; *Hambly v. Trott*, Cowp. 376: and see Serjt. Williams's note 1, to *Wheatley v. Lane*, 1 Saund. 216.

(*k*) *Bishop of Winchester v. Knight*, 1 P. Wms. 407.

(*l*) *Lord Hardwicke v. Ver-*

non, 4 Ves. 418.

(*m*) *Lee v. Bowler*, Rep. temp. Finch, 125.

(*n*) *Holtscorn v. Rivers*, 1 Cha. Ca. 127.

(*o*) *Martin v. Crump*, 1 Salk. 444.

to sell goods as factor, and is privy to an agreement that the proceeds shall be disposed of in a particular manner, he cannot, after he has got them into his hands by virtue of this engagement, retain them in discharge of a debt due to himself. Trover, indeed, could not be maintained against him; for he was put into possession by the owner; but even if trover would lie, it is a fit case for Equity; and a bill for an account would hold (*p*).

thus, trover would not lie against a party who has agreed to sell goods as factor, but who retains them in discharge of a debt due to himself; but Equity will compel him to account.

An exception to the 11th section of the stat. 21 Jac. 1, c. 19, (which now forms the 70th section of the consolidated bankrupt act (*q*),) is established, in favor of parties who have put property into the hands of a factor, merely to be by him disposed of; if the factor have a bare authority to sell on account of his principal, and not to sell the goods *as his own*; though he become bankrupt whilst the goods are in his possession, with the consent of the true owner, they cannot be seized under his commission: for this case, though within the letter, is not within the meaning of the statute (*r*). The ground of the exception is, that, the possession of such persons does not carry, to the understanding of the world, the reputed ownership (*s*). Lord Cowper, however, is stated, in one report (*t*) of *Copeman v. Gallant*, to have laid down a qualification of this rule as to factors; and to have

Goods belonging to his employer, in the possession of a factor at the time he becomes bankrupt, are not within the 70th sect. of the statute 5 Geo. 4, c. 98;

for such possession does not give the reputation of ownership.

Where this reason does not operate, and where, from his long possession, the goods

(*p*) *Weymouth v. Boyer*, 1 Ves. Jun. 424. See *post*, p. 172.
(*q*) Stat. 5 Geo. 4, c. 98.
(*r*) *Ex parte Dumas*, 2 Ves. Sen. 585; *Copeman v. Gallant*, 1 P. Wms. 314: and see under

the head of "Bankruptcy."

(*s*) *Horn v. Baker*, 9 Ves. 244.

(*t*) In margin of 7 Vin. Ab. 89.

have been looked upon as the bankrupt factor's own, who has obtained credit in consequence; there, Lord Cowper was of opinion, the case ought not to be taken out of the statute:

but, the force of this argument has been much weakened by Lord Redesdale's more recent observations.

An allowance of a share in the profits does not vest in a broker any property in the subject of the adventure; though it may, as to third persons, render him liable as a partner;

have declared, that, if a factor continue long in possession, by which means the goods are taken to be his own, and credit is given to him on that account; it would alter the case: and, that, it would be immaterial whether it was through fraud, or mere neglect, that such length of possession was permitted; for the inconvenience of giving a false credit would be the same in either case. But, this reasoning does not seem to have been satisfactory to Lord Redesdale, who observes, that, the simple fact that credit has been given on the property, is a circumstance which might belong to a variety of cases not within the statute (*u*). It is probable, therefore, that, where neither actual fraud is proved, nor such gross *laches* is shewn as would justify the inference of fraudulent intention; the *dictum* ascribed to Lord Cowper would not, in the present day, be acted upon; at least, not to its full extent. Even an agreement, that a broker shall be paid in a particular way, viz. by a share of the profits of the dealings in which he is employed, in lieu of brokerage, will not vest in him any share in the goods which he is employed to buy or sell. For, though a right to share in the profits of a particular adventure may render a person liable, to third persons, as a partner, in respect of transactions arising out of the particular adventure, in the profits of which he was to participate (*v*); it still does not give him any interest in the property itself which was the subject matter of the adventure; the power over the property remains in

(*u*) *Joy v. Campbell*, 1 Sch. & Lef. 338.

(*v*) See the Chapters on "Partnership," and on "Bankruptcy."

in the person who furnished the capital with which it was purchased. It follows from these principles, that, if the bankers of the true owner pay over the proceeds of a bill received from him to the broker, who claims to be interested therein as partner, on the ground that such bill was given in respect of the adventure in the profits of which he was to participate; it lies upon the bankers to shew, that, they were justified in making that payment: for if a banker, or other agent, take upon himself to hand over the property of his principal to another person, the *onus* rests upon him to shew that he had authority to do so (*w*).

If an agent make over the property of his principal to another person, it lies upon him to shew that he was justified in so doing.

The sum due for commission may either be fixed by special contract, or regulated by the usage of trade; but, in either case, an agent or factor may, in Equity, forfeit his claim to commission, by omitting to keep regular accounts (*x*): and, *a fortiori*, he may bring this loss upon himself, even at common Law, by a positive desertion of his duty (*y*): or by an ignorant or careless discharge of it (*z*). And where an agent is made executor to his former employer; his character of agent ceases, and, with it, his right to commission (*a*).

Rules as to commission; how the claim thereto may be forfeited.

Agent made executor, loses his right to commission.

If a banker (and the rule is equally applicable to any other agent) make advances to, or pay money on account of, his principal, after notice that such principal has committed an act of bankruptcy;

An agent must make no advance on account of his employer, after notice of his bankruptcy: nor can he set off

(*w*) *Smith v. Watson*, 2 Barn. & Cressw. 407; *S. C.* 3 Dowl. & Ryl. 758.

(*x*) *White v. Lady Lincoln*, 8 Ves. 371; *Beaumont v. Boulbee*, 11 Ves. 358.

(*y*) *Hurst v. Holding*, 3 Taunt. 36.

(*z*) *Denew v. Daverell*, 3 Campb. 453.

(*a*) *Hovey v. Blakeman*, 4 Ves. 609.

subsequent receipts against payments made.

cy; he must account to the assignees, if a commission issue, for all sums so improperly disbursed: and, if he have also received sums on the bankrupt's account, those sums will be considered as received to the use of the bankrupt's estate, and not to be set off against the payments made; which payments cannot even be proved as a debt under the commission: although, so far as they have been applied in discharge of creditors, they have, *pro tanto*, benefited the estate (*b*). But, if this were permitted, it would, to a certain extent, be confiding the execution of the bankrupt laws, and the payment of creditors, to the discretion of individuals; contrary to the policy of legislation with respect to mercantile dealings, and at great risk of fraud.

Liens in Equity, in many cases where the Law gives none:

lien means a right to detain property till a demand is satisfied.

A factor has a general *lien* for the whole balance due to him, in that capacity, upon consignments made to him by his employer:

There are *liens* which exist only in Equity, and of which Equity alone can take cognizance; though *lien*, in a proper sense, is a right which the Law gives. But it is usual to speak of *lien* by contract, though that be more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there exist a right to detain the property in question till a demand shall be satisfied (*c*). It would be impossible to carry on trade if a factor were not held to have a specific *lien* upon consignments made to him, for expenses which he thereby incurred; and it is now established, that, this *lien* may be made available not only for the discharge of

(*b*) *Hankey v. Vernon*, 3 Br. 313.

(*c*) *Gladstone v. Birley*, 2 Meriv. 403, 404.

of demands in respect of the particular transaction, but extends to cover the whole balance, connected with the employment as factor (*d*), due on the general account between the parties (*e*): which *lien* cannot be overreached, even by prerogative process (*f*).

And though the agent may have parted with possession of the goods, he retains a *lien* on the price, whilst in the hands of the purchaser; and upon any securities given for payment (*g*). But, if a factor redeliver property to his principal, by thus parting with the possession, he parts with his specific *lien* (*h*). Nor can any claim to *lien* be maintained by a factor, in regard to goods which have never actually, or constructively, at least, come into his possession (*i*). But, though a mere consignment of goods to a factor is not sufficient to give such consignee a *lien*, without other circumstances; yet, it seems, that although actual possession has never been obtained, or has been parted with, circumstances may establish, or continue, such a constructive possession as, both in Equity and at Law, will support the claim to *lien* (*k*). And, notwithstanding the possession may

and upon their price in the hands of a purchaser; or on unpaid securities for such price: but by redelivery of the property to his principal the *lien* is lost: nor can a factor claim *lien* upon goods which never, even constructively, were in his possession: but, under circumstances, constructive possession may give a *lien*.

If possession, have

(*d*) *Walker v. Birch*, 6 T. R. 263; *Houghton v. Matthews*, 3 Bos. & Pull. 494.

(*e*) *Kruger v. Wilcocks*, 1 Keny. Rep. 35.

(*f*) *The King v. Lee*, 6 Price, 378.

(*g*) *Houghton v. Matthews*, 3 Bos. & Pull. 489; *Vernon v. Hankey*, 2 T. R. 119.

(*h*) *Kruger v. Wilcocks*, Ambl. 254.

(*i*) *Kinlock v. Craig*, 3 T. R. 123, 786; *Nichols v. Clent*, 3 Price, 567.

(*k*) *Alderson v. Temple*, 4 Burr. 2239; *Lempriere v. Pasley*, 2 T. R. 496; *Nichols v. Clent*, 3 Price, 570; *M'Combie v. Davies*, 7 East, 7: and see the

though once parted with, be recovered, the *lien* revives.

A special contract for a particular mode of payment, excludes claim of *lien*:

which is also lost by assent to a particular disposition of the proceeds.

A broker has no *lien* upon a policy for his general balance against the party at whose request he effected it; if he knew it was on account of a third person.

have been absolutely parted with, yet, if it be subsequently recovered, the *lien* revives (*l*).

But, although a factor, as we have seen, has a *lien* both for his expenditure upon the goods in his possession, and his general balance upon former transactions, (at least upon such as are connected with his employment of factor,) still, if he enter into a special contract for a particular mode of payment; such special contract, in the nature of the thing, destroys the contract implied by the usage of mercantile dealings, and he loses the *lien* (*m*).

It has already been stated, that, a broker, or factor, who has assented to a particular disposition of the proceeds of goods, which he has undertaken to sell; cannot, in fraud of his agreement, claim a *lien* on such goods, or their price (*n*): nor can a broker maintain a claim of *lien*, for the general balance of his own account with his employer; upon a policy which he has effected, at the request, indeed, of his correspondent, but with a full knowledge, at the time, that, such policy was effected on behalf of a third person. But, as the servant of his employer, he may retain the policy, until the *lien* of his principal thereon is satisfied (*o*).

If

recent stat. of 4 Geo. 4, c. 83, by which it is declared, that, any person in whose name goods are shipped, shall be so far deemed the real owner, as to be enabled to give an effectual *lien* on such goods to persons advancing money, or giving credit, on the faith thereof.

(*l*) *Whitehead v. Vaughan*,

cited in Cooke's B. L. chap. 14, sec. 6.

(*m*) *Cowell v. Simpson*, 16 Ves. 280. See *Chase v. Westmore*, 5 Mau. & Sel. 186; and *Balch v. Symes*, 1 Turn. & Russ. 92.

(*n*) *Weymouth v. Boyer*, 1 Ves. Jun. 425.

(*o*) *Man v. Shiffner*, 2 East, 529.

If an agent, who is directed to effect a policy, represent himself as having a power which is not entrusted to him, and employ a sub-agent; such sub-agent, it has been held, cannot retain the sum he may receive upon the policy, from the person for whose ultimate benefit it was effected; but can only deduct from the amount the premium he has paid, and the other charges due, on this particular policy (*p*): for a sub-agent, who knows he is not dealing with the principal, cannot acquire a broker's general *lien* (*q*). It is clear, indeed, that, if the agent disclose his principal, at the time, he cannot in any way pledge the property of such principal, to a third party, for his own private debt (*r*). But, both Lord Ellenborough, and Sir Vicary Gibbs, C. JJ. distinctly held, that, if a policy of insurance be effected by a broker, in ignorance that the property to be covered by the insurance does not really belong to the persons by whom he is employed; he has a *lien* upon the policy for the amount of the general balance which they owe him. This rule rests upon the same Equity as that according to which, if goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from *him*, in an action by the principal for the price of the goods (*s*). The factor may be liable to his employer

How far a sub-agent can make a *lien* available.

An agent cannot pledge his principal's property, for his own debt, to one who knows him to be not the real owner: but, if a broker effect a policy upon property which he believes to belong to his employers; he has a general *lien* on the policy for his demands against those who employed him.

A purchaser from a factor who sells in his own name, may set off a debt due to him from such factor: against whom the principal, who trusted him, must

(*p*) *Lanyon v. Blanchard*, 2 Campb. 598. the real ownership would take the case out of the late stat. 4

(*q*) *Snook v. Davidson*, 2 Geo. 4, c. 83. Campb. 220.

(*r*) *Maans v. Henderson*, 1 East, 337. Such knowledge of (*s*) *George v. Clagett*, 7 T. R. 360; *Rabone v. Williams*, *ibid.* in note.

seek relief, unless the purchaser knew the seller to be only an agent.

ployer for holding himself out as the principal; but that is not to prejudice the purchaser, who, *bonâ fide*, dealt with him as the owner of the goods, and gave him credit as such. The fair question is, whether he knew, or had reason to believe, that, the person with whom he dealt was only an agent? and the party who seeks to deprive him of his *lien* must make out the affirmative (*t*).

Distinction, in questions of this kind, between the nature of a factor's, and of a broker's employment.

The distinction between a broker and a factor, is, in questions of this kind, very important. A factor is a person to whom goods are consigned for sale, by a merchant residing abroad or at a distance, and the factor usually sells in his own name, without disclosing that of his principal; who, with full knowledge of this usage, trusts him with the actual possession of the goods. But a broker is in a different situation, he is not trusted with the possession of the goods, and ought not to sell in his own name. A person, therefore, who deals with another whom he knows to act commonly as a broker, cannot, as against his principal, be allowed to set off a debt due from such broker, in discharge, or part payment, of the price of the goods so purchased: more especially, if he neglected to inquire whether, in that particular transaction, the vendor was acting as broker, or as principal. If such a claim were allowed, no merchant could safely employ a broker, who, by delivering a false note to the buyer, might defeat the rights of his employer altogether (*u*).

The

(*t*) Stat. 4 Geo. 4, c. 83. (*u*) *Baring v. Currie*, 2 Barn. Man v. Forrester, 4 Campb. 61; & Ald. 144. See stat. 4 Geo. Westwood v. Bell, *ibid.* 354. 4, c. 83, that any persons, in

The master of a merchant vessel is the agent of the owners; for supplies furnished (*w*), or repairs done to such vessel in this country, the owners are personally liable; as the master may also make himself, by the agreement (*x*); but, the ship cannot be pledged without a special contract: though where repairs are necessary in the course of a voyage, and must be done in a foreign country, the necessity of the case will justify the master in hypothecating both the ship and cargo (*y*). The necessity, however, which creates, must also limit, that power: the master must use it only for a reasonable purpose; for the benefit of the ship and cargo. If, instead of hypothecating the vessel, the master make himself personally responsible, by giving his own bills for the repairs done, (which may be the most advantageous course for the owner's interest, and, perhaps, even the only practicable mode of getting the repairs effected,) it seems to have been Lord Eldon's opinion, that, the master may, thereby, establish a *lien* on the ship; and, as he cannot hypothecate to himself, that, no instrument is necessary to raise this Equity (*z*). The case of *Hussey v. Christie*, however, was sent for the opinion of the Court of King's Bench, who certified

No *lien* on a ship, unless by contract, for repairs done there-to in this country: but, for necessary repairs abroad, the master may hypothecate both the vessel and cargo:

if, instead of so doing, he give his own bills for the repairs,

whether he thereby gains a *lien* upon the ship, is a question upon which the doctrines of common Law and those of Equity seem to be at variance:

against

whose names goods are shipped, shall be so far deemed the real owners, as to be enabled to give an effectual *lien* thereon, to parties advancing money on the faith of such shipments.

(*w*) *Speerman v. Degrave*, 2 Vern. 643.

(*x*) *Farmer v. Davies*, 1 T. R. 109; *Rich v. Coe*, Cowp. 639.

(*y*) *Watkinson v. Barnardiston*, 2 P. Wms. 367; *The Gratitude*, 3 Rob. Adm. Rep. 257; *Ex parte Shank*, 1 Atk. 234.

(*z*) *Hussey v. Christie*, 13 Ves. 600.

grounds for supporting the claim to equitable *lien*, in such cases.

When not mixed up with other circumstances, this question would properly, perhaps, be within the Admiralty jurisdiction: and, if decided upon the rules of civil Law, the *lien* would prevail.

against the master's *lien* (a): but, this determination does not seem to have been held conclusive on Courts of Equity by Lord Eldon; who, on a subsequent occasion, observed, that "where advances, for repairs, are made by the master, he must have a *lien*, without an instrument (b)." As, in a still more recent case, the Court of King's Bench abided by, and confirmed, their former decision (c); it should seem, that, according to the present state of authorities, the doctrine of Law is hardly consonant with that of Equity, upon this subject. If it is to be considered as a pure legal question, of course, the repeated judgments of Courts of common Law conclude it: but the arguments of convenience, amounting almost to necessity, in some cases, as urged by Lord Eldon (d), are powerfully in favor of the propriety of the master's making himself personally responsible; and when that is done for the benefit of the owners, it seems difficult to deny the equitable claim to *lien*. And as, in such cases, when not mixed up with other circumstances upon which the jurisdiction of our ordinary Courts of Law or Equity attaches, proceedings *in rem*, against the ship itself, come within the peculiar province of the Court of Admiralty; which, in many instances, adopts the civil Law as the basis of its judgments; it seems probable; (though no positive decision occurs to the present writer's recollection,) that, a master's *lien*, in respect of advances made for

(a) 9 East, 433.

Barnw. & Ald. 581.

(b) *Ex parte Halket*, 3 Ves. & Bea. 136.

(d) *Hussey v. Christie*, 13 Ves. 600.

(c) *Smith v. Plummer*, 1

for the repair of a ship, would be admitted in the Admiralty Court; for a right to priority of payment, in such case, is distinctly recognized by the code of civil Law (*e*). The Court of Admiralty, however, will not interpose their jurisdiction *in rem*, where there are cross-demands between the litigant parties, which can only be properly investigated in the Court of Chancery (*f*): Where accounts are to be taken, and the respective interests of contending parties to be ascertained, it is the business of the Court of Chancery to interfere; and a prohibition would issue if the Court of Admiralty were to proceed (*g*).

But the Court of Admiralty will not interpose, where there are accounts to be taken, and cross demands to be settled, which can best be done in Chancery.

It is clear, that, the parties who accept, in payment for repairs of a ship, the captain's bills, relying on his personal security, cannot afterwards assert any claim to *lien* on the vessel; to establish such a right, they must at least shew, that, although the bills, by mistake, purported only to pledge the captain's responsibility; yet, that, the contract and true intention was, that, the ship also should stand pledged, as a further security (*h*). Where money has been borrowed by the master of a vessel, ostensibly for the purpose of repairing, or supplying, the ship; and such repair, or supply, appears to have been necessary; the *lien* of a party who makes the advances will not be affected by a misapplication

By distinct acceptance of personal security, claim to specific *lien* waved.

Where money has been advanced for the necessary repairs, or supplies, of a ship, in a foreign country, a misapplication of the money by the master will not affect the *lien* of the lender.

(*e*) Dig. lib. 42, tit. 5, sec. 26 & 34; and Domat. lib. 3, tit. 1, sec. 5, article 7: as to the admiralty jurisdiction, see *Metone v. Gibbons*, 3 T. R. 269.

(*f*) *The John*, 3 Rob. Adm. Rep. 292.

(*g*) *Haly v. Goodson*, 2 Meriv. 80.

(*h*) *Ex parte Halket*, 19 Ves. 474.

tion of the money by the master to other purposes; that is a matter between him and his employer, with which a third person has nothing to do; unless personally implicated, by the facts of the transaction, in the fraud which may have been practised (i). And though it was formerly held, that, the master of a ship could not sell (k), in cases of the most unyielding necessity, that principle has been qualified in modern times: but, even now, the master cannot sell, either ship or goods, except in a case of inevitable necessity (l).

The master may sell his vessel, or her cargo, in cases of clear necessity.

How the right to contribution is to be enforced, when part of the cargo has been sacrificed to the security of the remainder.

Should the master of a vessel find it necessary, for the safety of the ship, to throw a part of the cargo overboard; the owners of such part of the cargo as is preserved are liable to contribution towards the loss; and the master is not bound to deliver any part of the cargo, until he has the security of each freighter for his proportion. But, this right of *lien* is personal to the master; and the several owners of the different parts of the cargo cannot compel him to exercise it: if he omit to do so, the right to contribution will, no doubt, still remain, but it must be enforced by regular process, not by asserting a *lien* (m).

An agent cannot delegate his authority;

Where a personal confidence is reposed in any agent, he cannot transfer his commission to a stranger; a delegated authority can be executed only

(i) *The Gratitude*, 8 Rob. Adm. Rep. 272.

(k) *Johnson v. Shiffen*, 2 Lord Raym. 984; *Tremenheere v. Tresilian*, 1 Siderf. 45.

(l) *Freeman v. East India*

Company, 5 Barn. & Ald. 623; S. C. 1 Dowl. & Ryl. 240;

Cannan v. Meaburn, 1 Bingham 247.

(m) *Hallett v. Boutfield*, 18

Ves. 191.

only by the person to whom it is entrusted: though of course, if the employer assent to the substitution of a third person as his agent, he cannot subsequently raise an objection on that ground (n).

without the assent of his employer.

But, the general rule being, that, an agent cannot bind his principal beyond the limits of his authority (o), it behoves those who transact business with an agent to see that his acts are strictly within the scope of his commission. It is equally essential, that, they should be satisfied, the authority

It is prudent, in dealing with an agent, to ascertain the limits of his authority;

has not been revoked; every power of attorney is, in its nature, revocable; and, in ordinary cases, the jurisdiction of Courts of Equity cannot be founded on such an instrument: though, where it has been executed for valuable consideration, Equity will not permit it to be revoked (p); for this would be a plain fraud. But, a power of attorney to a creditor to receive money, notwithstanding it may purport to be irrevocable, is revoked by the debtor's death: and when there has been no assignment of the sum so intended to be received, nor any specific appropriation thereof; the mere power will not avail against the general creditors of the party who executed it; but the money will be part of his assets (q).

and that it has not been revoked.

Powers of attorney in their nature revocable;

but, when executed for valuable consideration, the revocation not allowed in Equity.

A power given to a creditor to receive money, however, is revoked by the debtor's death; if the money has not been previously appropriated.

To explain a doubtfully worded letter of attorney to a factor, it seems, that, evidence of the custom of merchants, in regard to transactions of a nature

The custom of merchants admitted to explain,

(n) *Coles v. Trecothick*, 9 Ves. 251; *Blore v. Sutton*, 8 Meriv. 246.

(p) *Bromley v. Holland*, 7 Ves. 28.

(o) *Bank of Scotland v. Watson*, 1 Dow, 40, 45; see *infra*.

(q) *Lepard v. Vernon*, 2 Ves. & Bea. 53.

and limit, the authority given to a factor.

Private instruction given to an agent in a particular instance, will not affect a purchaser from him, when his employers have previously recognized his dealings in the ordinary course:

but this rule applies only to general, not to special, agents.

Express limitations, however, are necessary to exclude the reasonable discretion of even a special agent; who, if employed to get a bill discounted, may bind his principal by indorsement, for this is, ordinarily, an act

ture similar to that in question, is admissible (*r*).

And such evidence may even be received to limit, what in terms is, a general authority (*s*). On the other hand, notwithstanding private instructions as to a particular parcel of goods; the general authority of agents to sell, so as to bind their principal, as far as the purchaser is concerned, may be inferred from their general course of dealing (*t*), which has been previously recognized by their employers (*u*).

But, although, for the convenience of trade, the rule last mentioned prevails with respect to general agents, still, where a special agent is only employed to do a single act, he must, as we have seen, strictly pursue his authority, or his principal will not be bound: the agent may render himself liable for any act done in excess of his authority, but the party who incautiously deals with him has no remedy against the principal (*w*). Express limitations, however, of even a special agent's authority, are necessary to exclude his reasonable discretion, as to such subordinate acts as are fairly and usually incident to the main business entrusted to him; thus, a special agent, employed to get a bill discounted, may bind his principal by indorsement, unless he has received positive instructions not to do

(*r*) *Ekins v. Macklish*, Ambl. 186.

(*s*) *Dickinson v. Lidwall*, 4 Campb. 280.

(*t*) *Whitehead v. Tuckett*, 15 East, 408.

(*u*) *Daniel v. Adams*, Ambl. 498: see *suprà*; and, in *The East*

India Company v. Hensley, 1 Espin. N. P. C. 112, see the distinction taken by Lord Kenyon: see, also, *Howard v. Braithwaite*, 1 Ves. & Bea. 209.

(*w*) *Shipley v. Kymer*, 1 Mau. & Sel. 494.

do so (*x*); for such an act is in the ordinary course of dealing, and without indorsement it might be very difficult to negotiate the bill. And, it is clear, there would be no safety in mercantile transactions, if a general agent could not bind his principal, within the limits of the authority with which he has been *apparently* clothed, by his employer, in respect of the subject matter (*y*). It would be a palpable fraud, indeed, if a party, who had ostensibly conferred upon his general agent the ordinary powers, under which business of a similar kind is commonly transacted, could elude responsibility by secret instructions: and, in such cases, it seems absolutely necessary to restrict the generality of the rule, that, if a person is acting *ex mandato*, those dealing with him must look to his mandate (*z*).

required by the party discounting.

Every general agent may bind his principal within the limits of the authority ostensibly given to him:

and the employer cannot evade responsibility by secret instructions.

In perfect conformity with the distinction just stated, it is now established, that, brokers, or factors, may sell the goods entrusted to them; for that is the ostensible purpose of the consignment: but they cannot pledge the goods, without special instructions; for that is not a business the transaction of which forms their usual and understood employment (*a*). And, as *liens* are personal, a factor, or broker, who pledges his principal's goods,

Brokers or factors may sell, but, without special instructions, cannot pledge, the goods entrusted to them.

To what extent a factor may transfer his *lien* on his employer's goods.

(*x*) *Fenn v. Harrison*, 3 T. R. 760; *S. C.* 4 T. R. 177.

(*y*) *Pickering v. Busk*, 15 East, 42.

(*z*) *De Bouchout v. Goldsmid*, 5 Ves. 213.

(*a*) *Kuckein v. Wilson*, 4

Barn. & Ald. 447; *M'Combie v. Davies*, 6 East, 540: but see the stat. 4 Geo. 4, c. 83, that, where goods have been shipped in the name of any person whatever he may pledge them.

In what case an innocent pawnee may retain goods against a person who has been induced to part with the absolute property by fraud.

Bill of discovery lies in aid of legal remedy for goods pledged by a factor.

Negotiable securities not within the general rule as to transfer of a principal's property by a factor.

A *bonâ fide*

as his own, does not thereby transfer any title to the pawnee, even to the extent of any *lien*, which such factor, or broker, had on the goods in question: though, if the possession of the goods had been handed over with notice of the *lien*, and as a security only to the extent of such *lien*, the transfer would not be *tortious* (b). There may, even, be cases in which one person, by a gross fraud, persuades another to make over to him the absolute property in goods, and, if they are subsequently pledged to an innocent pawnee, it may be, that, however gross the fraud, the former owner may have no right to retake the goods, otherwise than subject to the pledge: but, so long as he retains the ownership, a man may retake his goods, notwithstanding any act whatsoever which a stranger may do (c): and, for the purpose of pledging, a broker, or factor, is, as we have seen, *quasi* a stranger. To assist the legal remedy, therefore, for recovery of goods pledged by a factor, a bill of discovery may be maintained in Equity (d).

The rule as to the transfer of a principal's property by a factor, is not applicable, however, to negotiable securities. Every *bonâ fide* holder of instruments of this description derives his title from the instruments themselves; the property in which passes by delivery (e). For the law is settled,

(b) See the last cited case, on a motion for a new trial, 7 East, 6.

(c) *Hooper v. Ramsbottom*, 6 Taunt. 13; *Hartop v. Hoare*, 3 Atk. 48.

(d) *Marsden v. Panshall*, 1 Vern. 407: and see *Strode v. Blackburne*, 3 Ves. 226.

(e) *Wookey v. Pole*, 4 Barn. & Ald. 8; *Hartop v. Hoare*, 3 Atk. 50.

tioned, that, a holder coming fairly by bills or notes, without notice of any circumstances affecting their validity (*f*), has nothing to do with the transaction between the original parties; unless, perhaps, in the single case, (which is a hard one, but has been determined), of a note for money won at play (*g*). But, where a person has been plundered of bank notes, the Bank is justified in suspending payment, till it is ascertained, that, the party tendering them is not contaminated with the guilt (*h*).

holder of bills has nothing to do with the fairness of the dealings between the original parties: unless the bills were given for a gambling debt.

Practice as to stolen bank notes.

The question, in such cases, (with the single exception above noticed), is always one of *bona fides*; and, even one who has not been personally privy to any fraud in accepting the transfer of property of this kind, may constructively be implicated in such fraud: for instance, if a man receive securities from his own agents, who acted *malá fide* in giving them to him, the principal, taking them through such agency, must take them with all the defects of title belonging to the agent (*i*). It may be questionable how far this decision, (as to the purpose for which it is cited), is affected by the statute which passed shortly after (*k*), and, probably, in consequence of it. The question in *Glyn v. Baker* arose upon a transfer of India bonds, and

A principal who accepts from his own agent securities, which the agent had no right to transfer, it has been said, cannot retain them, though he was not privy to any fraud in the transaction:

but, *quære*, if this decision be not overruled by stat. 51 Geo. 3, c. 64?

(*f*) *Amory v. Meryweather*, 2 Barn. & Cressw. 579; *S. C.* 4 Dowl. & Ryl. 92.

tion; but see, now, stat. 58 Geo. 3, c. 93.

(*g*) *Peacock v. Rhodes*, 2 Dougl. 635; *Wookey v. Pole*, 4 Barn. & Ald. 9; *Graves v. Houlditch*, 2 Price, 147. Usury was, formerly, another excep-

(*h*) *Solomons v. Bank of England*, 13 East, 137.

(*i*) *Glyn v. Baker*, 13 East, 515: see *post*.

(*k*) Stat. 51 Geo. 3, c. 64, sec. 4.

and appears to have called the attention of the Legislature to the convenience of giving a legal effect to such transfers, and making the property pass by delivery of possession. But, it does not necessarily follow, because, since the act, a party taking a transfer of India bonds, for good consideration, will be protected in the possession, however defective the title of the person from whom he received them might be, when that person is *not* his own agent; that, he will, therefore, stand free from all imputation of even constructive privity to a fraud committed by his own agent, in that very transaction. The words of the act, however, express no such distinction; this suggestion, therefore, must be received (as it is offered,) very doubt-

if so, the responsibility of a principal for the fraud of his agent, receives this further qualification.

Generally speaking, a principal is taken to know all that is known by his agent in the course of any transaction; but not the information acquired by the agent before he was employed as such:

or, it seems, in transactions distinct from the very one complained of:

fully: but if it be inadmissible, the doctrine of the responsibility of a principal for the fraud of his agent, must receive this further qualification.

The general rule, certainly, is, that, the principal must be taken to know whatever is known to his agent; and, that, by construction of law, notice to an agent is notice to the principal, if the agent come to the knowledge of the fact while he is concerned for the principal (*l*). But, of course, the agent cannot stand in the place of the principal, until the relation of principal and agent is constituted; and as to all information which he has previously acquired, the principal is a mere stranger (*m*). It seems, too, that, in most cases, the notice to the agent must have been given, or acquired,

(*l*) *Hiern v. Mill*, 13 Ves. 120.

(*m*) *Mountford v. Scott*, 3 Mad. 40.

quired, in the course of the very transaction complained of (*n*); and, with respect to counsel or solicitors, at any rate, employed to examine titles to estates, this restriction seems indispensable: otherwise, as Lord Hardwicke frequently expressed himself, it would make purchasers' and mortgagees' titles depend altogether on the memory of their legal advisers; and the counsel of greatest eminence would be the most dangerous to employ (*o*). Which argument had been previously used by Chief Baron Reynolds, who laid it down as clear law, that, a purchaser shall never be affected by constructive notice to his counsel who had not notice at that particular time; for it is not possible for a counsel to have in his memory all the business which has gone through his hands for several years before (*p*). It does not, however, appear necessary, even in such cases, that notice should be given, in express terms, at the very time of the transaction: it seems, that, the principal will be bound, if knowledge of the circumstances, at the time, can be brought home *de facto* to his legal adviser; although notice may have been received on a previous occasion (*q*). For there is no difference as to personal or constructive notice, in its consequences, except as to guilt; and it would be very inconvenient if the rule were otherwise, for

this last restriction is clearly requisite with respect to counsel and solicitors:

but, it is not necessary to prove express notice, given at the time of the transaction, if knowledge *de facto* can be brought home to a legal adviser, or agent.

Constructive notice as binding as actual notice.

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| (<i>n</i>) <i>Hiern v. Mill</i> , <i>ubi supra</i> . | <i>conberge</i> , Fitz. Gibb. 111. |
| (<i>o</i>) <i>Lowther v. Carlton</i> , 2 Atk. 242; <i>Worsley v. Earl of Scarborough</i> , 3 Atk. 392; <i>Warwick v. Warwick</i> , <i>ibid.</i> 294. | (<i>q</i>) <i>Toulmin v. Steere</i> , 3 Mer. 222; <i>Le Neve v. Le Neve</i> , 3 Atk. 646; <i>Mountford v. Scott</i> , 1 Turn. & Russ. 280; <i>Norris v. Le Neve</i> , 3 Atk. 36. |
| (<i>p</i>) <i>Fitzgerald v. Lord Fau-</i> | |

By subsequent approbation, the party for whose benefit acts were done recognizes the doer as his agent *ab initio*.

Without such ratification, a principal not bound when his agent exceeds his authority.

Verbal declarations of an auctioneer not admissible to contradict the particulars; at least not for the purpose of enforcing specific performance;

but, when personal notice of a mistake in the

for then notice would be avoided in every case, by employing an agent (*r*). And a person will be deemed to have been an agent *ab initio*, if the acts done by him, before he was engaged in that capacity, are subsequently approved by the party for whose benefit he was, though without instructions, negotiating (*s*).

But, in order to bind the principal, the agent must either have had full powers to conclude a transaction, or his dealing, if without such powers, must have been afterwards ratified; an agent employed to draw up an agreement upon certain terms, must not agree to other terms (*t*). And where a sale is made under written particulars, the verbal declarations of the auctioneer at the time of sale (though it is decided he is to be considered as equally the agent for both the vendor and the vendee (*u*),) are not admissible to contradict the particulars; at any rate, not, in general cases, for the purpose of enforcing a specific performance: whether such evidence might be admitted on behalf of a defendant, resisting, on the ground stated, specific performance according to the particulars, is more questionable (*w*). It seems doubtful, also, whether there might not be room for the admission of such evidence;

(*r*) *Sheldon v. Cox*, 2 Eden, 228; *S. C.* Ambl. 626; *Maddox v. Maddox*, 1 Ves. Senr. 62.

(*s*) *Jennings v. Moore*, 2 Vern. 610; *Merry v. Abney*, 2 Freem. 151.

(*t*) *Shelburne v. Inchiquin*, 1 Br. 351.

(*u*) *Kenworthy v. Schofield*, 2 Barn. & Cressw. 947.

(*w*) *Buckmaster v. Harrop*, 13 Ves. 471; *Higginson v. Clowes*, 15 Ves. 523; *Clinan v. Cooke*, 1 Sch. & Lef. 39; *Howard v. Braithwaite*, 1 Ves. & Bea. 210. See the head of "Specific Performance."

evidence; even to compel performance where the purchaser can be distinctly proved to have had personal information given him of a mistake in the printed particulars of sale (x).

particulars has been given, the case may be different.

An agent for sale continues such no longer than till the sale is completed: an auctioneer, therefore, has no authority, after he has sold an estate, to treat as to the terms upon which a title is to be made (y). Where, however, a person is employed, not merely as auctioneer for the sale of property, and on that single occasion, but, an intimate connexion and confidence between his employer and himself subsists; the duties of such confidential agency will not terminate when he descends from the *rostrum*; and he will be disqualified, *prima facie*, from becoming the purchaser of the property he was employed to sell; if the rule were different, a fraudulent auctioneer might have a strong inducement to chill the sale, in order that the property might be bought in; when his situation would give him advantageous, but dishonest, opportunities of purchasing at an inadequate price (z).

An agent for sale continues to be agent only till the sale is completed:

but his duties do not terminate, necessarily, when he descends from the *rostrum*.

If a factor lade the goods of his employer on board ship, without executing a charter-party, the goods, the lading, and his principal, are liable for the freight; but not the factor: though if he enter into a charter-party, he may thus make himself personally liable (a): and a party who has notice of a contract between an agent and his employers, that

Factor not answerable for the freight of his employer's goods, unless he executes a charter-party: but the cargo, and principal, liable.

A party who gives credit to an agent individual-

(x) *Ogilvie v. Foljambe*, 3 Meriv. 65.

(z) *Oliver v. Court*, 8 Price, 160.

(y) *Seton v. Slade*, 7 Ves. 276: see *suprà et infra*.

(a) *Paul v. Birch*, 2 Atk. 621.

ly, may exclude himself from any claim upon the employers:

but no private arrangement between the principal and the agent will have this effect.

Even a receipt given to the agent will not discharge the principal, if the money has not really been paid:

unless credit has been given to the agent in passing his accounts, on the faith of such receipt:

in such case, the vendor's remedy is against the agent only.

that the agent shall be at the sole expense of particular acts; and, in consequence of such notice, or merely as preferring his security, has given credit to the agent individually; may, by so doing, exclude himself from any claim against the principals (b): but, unless under such particular circumstances, no agreement between the principal and agent, nor even payment of any demand by the former to the latter, will be an acquittal of the principal, when the agent has not duly handed over the money to the creditor (c). Even a receipt given by the creditor to the agent, will not discharge the principal, if the debt has not been actually paid, unless such receipt has enabled the agent to obtain a fictitious credit with his principal in passing his accounts. When that has been the case, and there has been *laches* on the part of the creditor in applying for his money, he will be deemed accessory to the fraud practised on the principal; and, as against him, will be estopped by the receipt, whether it was given fraudulently or only imprudently (d). But, as against the agent, the receipt would not avail, provided it could be clearly proved that the money was not actually paid (e).

As the Law protects a principal against the consequences of fraudulent concert between his agent and the party with whom a contract, or purchase, is made on his account; so, a vendor, or other dealer,

(b) *Rich v. Coe*, Cowp. 639; *Paterson v. Gandesagui*, 15 East, 68.

(c) *Speerman v. Degrave*, 2 Vern. 643.

(d) *Tolson v. Hallett*, Ambl. 272; *Wyatt v. Marquis of Hertford*, 3 East, 147.

(e) *Coppin v. Coppin*, 2 P. Wms. 294.

dealer, will be equally protected against any such conduct between the principal and his agent. Upon this principle, if a merchant employ a broker, who is indebted to him, to effect insurances on his behalf, with a view that the premiums should go in liquidation of the accounts between them; if the policies are underwritten, but the premiums are not, in fact, paid, and the assured, well knew that the broker never had the means of paying them; the assured cannot take advantage of this fraud, contrived between his agent and himself; but, even at common Law, it seems, the premiums may be recovered against him; notwithstanding the general rule, that, if an underwriter choose to subscribe a policy without receiving payment, he can only resort to the broker, to whom he gives credit at his own risk (*f*). Thus, also, although goods may have been sold, in form, to the agent, on his own account, yet, if the principal at all intermeddled with the sale, or, if it should appear, that, the purchase was contrived with a view that the goods, so obtained, should be applied in extinction of a debt due from the agent to the principal; the latter will be responsible to the vendor, on the ground of fraud (*g*). In the case of brokers of the City of London, who are prohibited from making purchases, in the way of trade, on their own account; the mere fact, that, a bill of sale is made out in the name of the broker, does not affect the liability of the principal, either to

A principal cannot avail himself of advantages fraudulently concerted through the medium of his agent:

but, where there is no fraud in the principal, an underwriter can only look to the broker for payment of his premium.

Though a sale be made, formally, to a broker, on his own account; yet, if this was merely contrived to liquidate a debt from the agent to the principal, the latter will be liable for the price.

London brokers must not trade on their own account: but bills of sale made out in their names, when the real purchasers are known, no breach of the

his

(*f*) *Mavor v. Simeon*, 3 Taunt. 497: see *infra*.

(*g*) *Wilson v. Hart*, 7 Taunt. 304.

broker's bond; nor can that fact alter the liabilities of the principals.

A merchant cannot take credit with underwriters for premiums which they have been prevented from receiving by his own fraud upon the agent he employed.

How far verbal declarations of an agent may be evidence against his principal:

a mere admission by an agent cannot be assimilated

his agent, or to the vendor, provided it has been distinctly understood, by all parties, on whose account the purchase was really made. Nor is such a transaction a breach of the broker's bond for due performance of his public office (*h*).

Where a merchant has practised a fraud not only upon the underwriters, but also upon his own broker, whom he induced to make insurances, on his behalf, upon an engagement to supply the means of defraying the necessary premiums, which engagement he never fulfils: there, notwithstanding the policy is, as we have seen, in general conclusive of the payment, it would be a monstrous proposition to hold, that, the assured should be entitled to credit, in account with the underwriters, for the premiums which they never received, but which they ought to have received, and would have received, but for his fraud upon his own agent (*i*).

An agent may, undoubtedly, within the scope of his authority, bind his principal by his agreement: and what the agent has *said* may be what constitutes, or at least was the inducement to, the agreement. Therefore, in cases where writing is not necessary by Law, evidence must be admissible to prove the statement or representation of the agent, which led to the conclusion of the contract. But, except in some way of this kind, what is said by the agent cannot be evidence against the principal. Mere narration of a fact, in the course of conversation, (though it may have some relation to

(*h*) *Kemble v. Atkins*, 7 Taunt. 263.

(*i*) *Foy v. Bell*, 3 Taunt. 496: see *supra*.

to business in which the person making the communication was employed as agent), cannot be evidence of the existence of the fact. If any fact, material to the interest of either party, rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. It is impossible to assimilate the admission of an agent to the admission of the principal (k).

ed to an admission by the principal.

If a factor, however, sell goods for a principal, the evidence of the factor is admissible against the vendee; and, on the other hand, the factor may be made a witness to prove the sale of goods to him, as factor, for the use of his principal (l).

The evidence of a factor may be used, both for and against his principal.

As a general rule, there can be no difference, with respect to the discharge of a debtor, whether payment is made to the creditor, or, to his duly authorized agent (m). But a mortgagor, before he pays the mortgage debt to an agent of the mortgagee, must at least see, that, he is in possession of the mortgage deed: for, though the agent may have been duly empowered to receive the interest, it does not follow, that, the mortgagee ever intended to entrust him with the receipt of the principal money (n). And although the mortgage deed has been left in the hands of an agent, who delivers it up on receiving payment of the money due thereon; this, it seems the better opinion, will be no sufficient discharge, for the estate ought to be regularly

Generally, payment to an agent is as good a discharge as payment to the principal: but a mortgage debt cannot be securely paid to an agent, unless he has possession of the mortgage deeds, at least:

and even the redelivery of the deeds would be an imperfect discharge: the estate should be reconveyed.

(k) *Fairlie v. Hastings*, 10 Ves. 473.
Ves. 126.

(l) *Snee v. Prescott*, 1 Atk. 248. (n) *Henn v. Conisby*, 1 Cha. Ca. 93; *Gerrard v. Baker*, cited *ibid.* p. 94.

(m) *Thomson v. Thomson*, 7

Where no conveyance is required, still the principal of a debt must not be paid to the agent who has been wont to receive the interest, unless the security is in his hands: even where such agent has received part of the debt, and handed it over to his principal, his authority to receive the remainder will not be inferred, if the security be not entrusted to him:

or unless it be proved that he received the first partial payment as a duly authorized agent, and the authority has not been countermanded.

An obligor who sends a bond to his agent, to be delivered up in consequence of payment made to such agent, cannot recal the bond, though by the insolvency of

regularly reassigned (o). And where a scrivener has put out money at interest, and has been in the habit of receiving the interest regularly; still, if the security is not left in his custody, payment of the principal monies due cannot safely be made to him (p). Even where a part of the principal sum due on bond has been received by a scrivener, and paid over to the obligee; still, if the remainder of the debt be paid to the same scrivener, who fails to pay it over to the creditor; the receipt of the scrivener will be no discharge of the debt, provided the security was not entrusted to such scrivener; or unless it can be proved that he had express authority from the creditor to receive the money: which authority would not be inferred from the previous receipt of a part (q). But, if the fact of agency can be proved, and also that the authority had never been countermanded, the whole of the payments made to the scrivener must be allowed by the creditor, who had accepted a part through his medium (r): for, we have before seen, that, a principal cannot avow the act of his agent as to part, and disavow it for the rest. And if, on payment of a bond debt to an agent, the principal send to such agent the bond (which he had previously, and at the time of payment, kept in his own custody) for the purpose of being delivered up to the obligee; although the money, in consequence

(o) *Duchess of Cleveland v. Vern.* 150.
Dashwood, 2 Freem. 249; (q) *Wolstenholme v. Davies*,
Whitelock v. Witham, 1 Salk. 2 Freem. 290.
 157. (r) *Duchess of Cleveland v.*
 (p) *Roberts v. Matthews*, 1 *Dashwood*, 2 Freem. 250.

quence of the insolvency of the agent, should never come to the hand of his principal, the latter cannot recal the bond: if he should obtain it, and attempt to put it in suit, by a bill in Equity he may be enjoined from proceeding in the action; and compelled to deliver up the bond, with costs: for, from the time the obligee trusted his agent with the security, the agent was a trustee for the obligor; the money being paid (s).

the agent the money does not come to hand.

In Equity, from the time such bond reached the agent it was a trust for the obligee; the money being paid.

As between vendor and vendee, when a deposit of part of the purchase money is made, to bind the contract, if the vendor has the sole nomination of the agent who is to receive such deposit, (as is the case where a sale is made by auction (t),) it is but reasonable, that, he should also run the risk of his own agent's responsibility: and, in other cases, where the stake-holder is equally the nominee of both parties, either has a right to propose changing the stake-holder; and the party refusing takes upon himself the risk: of course, a motion for payment of a deposit into Court has at least as much weight as a private proposition for changing the stake-holder; and the party who resists such motion must bear any consequent loss of the deposit (u).

The vendor answerable for the security of a deposit made in part payment of a purchase by auction.

Where the stake-holder is equally the nominee of both parties, and one wishes him to be changed; the other, by refusing his assent to such change, takes upon himself the risk of the actual holder's solvency.

We have seen, that, a duly authorized agent, may, by his receipt, (given in the ordinary course of transacting business), for monies due to his principal, discharge the debtor; but if, instead of payment of the debt in full, he accept a composition,

An agent must not accept a composition of his principal's debt:

(s) *Abingdon v. Orme*, 1 Eq. Mad. 596.
Ca. Ab. 145.

(t) *Annesly v. Muggridge*, 1 Ves. 150.

but, though by such composition he cannot bind his principal, he may involve himself.

An attorney is responsible to his client for submitting his rights to an award contrary to instructions: the client, however, will be bound by the submission at Law: *quære*, whether in Equity?

A principal cannot retain a fraudulent purchase, though made without his privity by his agent: for, the mere transfer of an advantage obtained by fraud will not sanction its retention:

tion, this may be evidence of fraudulent concert, and the debtor may be compelled to pay the money over again (*w*). But, though an agent cannot, without express authority to do so, make such a composition of a demand as will bind his principal; yet he may by the terms of his agreement make himself responsible, if full payment be afterwards insisted upon (*x*). And, an attorney, though he may, at Law, bind his client by submitting, on his behalf, to an award; is yet responsible to such client if he make the submission fraudulently, or contrary to his instructions (*y*). Whether a solicitor has the same power of binding his principal, by submitting his client's interests, in matters brought by bill before the Court of Chancery, to reference, without instructions for that purpose, may be questioned (*z*).

A fraudulent purchase made by an agent on account of his principal, though without his privity, cannot be retained (*a*): for there is no doubt, that, it is competent to a Court of Equity to take away from third persons (even when they stand unconnected by the relation of principal and agent), the benefits which they have derived from the fraud, imposition, or undue influence of others (*b*). *A fortiori*,

(*w*) *Penn v. Browne*, 2 Freem. 214. "Solicitor and Client."

(*x*) *Parrot v. Wells*, 2 Vern. 127. (*z*) *Colwell v. Child*, 2 Freem. 154; S. C. 1 Ch. Ca. 86.

(*y*) *Filmer v. Delber*, 3 Taunt. 486; *Rex v. Addington*, Sayer, 259; *Barker v. Braham*, 3 Wils. 374, 378. (*a*) *Ekins v. East India Company*, 1 P. Wms. 395.

See the heads of "Award," and (*b*) *Huguenin v. Baseley*, 14 Ves. 289: see *ante*, pp. 183, 189; and, *post*, the head of "Settlement and Conveyance."

fertiori, if a principal, for whose benefit a fraudulent bargain has been made, only kept personally aloof from the negotiation for the purpose of pleading that he was not privy to it; this will only be a further evidence of fraud: *fraus est celare fraudem*; and his pretended ignorance will not avail him (c).

and where a principal has kept himself personally aloof, only for the purpose of disclaiming privity, the artifice will not avail him.

After very considerable doubts, and some contradictory decisions, it seems now fully established, that, although sales by auction are within the statute of frauds; yet, that, equally with respect to sales of real as of personal property, the auctioneer is the duly authorized agent of both parties, and that his signature, on their behalf, satisfies the statute, and binds both the vendor and the vendee (d).

An auctioneer is the agent of both buyer and seller; and his signature satisfies the statute of frauds, and binds both parties:

But, upon the principle, which we have before adverted to, namely, that, *delegatus delegare non potest*; the auctioneer cannot, without evidence of special assent, appoint one of his clerks to sign contracts of sale, as his proxy (e).

but, without special assent, he cannot delegate this part of his agency to a clerk.

The additional premium which is always given on a *del credere* commission, is the price paid by a principal to his factor, in consideration of an undertaking by the factor to warrant due payment for the goods he sells; it presupposes a guaranty.

By accepting a *del credere* commission, a factor undertakes that the goods he sells shall be paid for:

But, although the guarantor is to answer for the solvency of the vendee, and to pay the money if he

but the principal should make his first application,

(c) *Ardglass v. Pitt*, 1 Vern. 239.

C. on appeal, 1 Jac. & Walk. 351; *Emmerson v. Heelis*, 2

(d) *Blagden v. Bradbear*, 12 Ves. 466; *Buckmaster v. Harrop*, 13 Ves. 472; *Kemcys v. Proctor*, 3 Ves. & Bea. 59; *S.*

Taunt. 47.

(e) *Coles v. Trecothick*, 9 Ves. 251. See, also, *Blore v. Sutton*, 3 Meriv. 246.

it seems, to the vendee: unless the form of the instrument renders the broker liable primarily.

he does not; yet, application must, it seems, be made, in the first instance, to the vendee, as the primary debtor, before proceeding against the guarantor; unless where the broker has, by the form of the instrument, made himself primarily liable (*f*).

Where an agent purchases expressly as such, he incurs no personal responsibility;

but an agreement by an agent for a compromise of his principal's rights, is binding on himself alone.

And where there is no practicable recourse to principals, professed agents may be personally liable: as, where public works are directed by commissioners.

and though such questions are cognizable at Law, they may involve intricate accounts, more fitted for investigation in Equity.

No general rule is better ascertained, or stands on a surer foundation, than this: that, where an agent names the principal for whom he, expressly as agent, purchases or contracts, the principal is responsible, and not the agent (*g*). But if an agent enter into a compromise, on behalf of his principal, without due authority, this is a fraud; and he renders himself, as we have seen, liable to make good the engagement he so improperly undertook to conclude (*h*). Where there is no principal to whom it is practicable to have recourse, there agents may, in some cases, though professedly acting as such, make themselves personally responsible. Thus, commissioners for making a navigation, or an inclosure, are personally liable for any contract entered into, or orders given by them: for it would be absurd to suppose the workmen employed gave credit to the undertaking, and not to the commissioners: and though such a question is cognizable at common Law (*i*), yet, it may frequently, as involving intricate accounts, be more fitted for investigation in a Court of Equity (*k*).

A

(*f*) *Morris v. Cleasby*, 4 Mau. & Sel. 574.

(*g*) *Ex parte Hartop*, 12 Ves. 352.

(*h*) *Johnson v. Ogilby*, 3 P.

Wms. 278; *Parrot v. Wells*, 2 Vern. 127.

(*i*) *Eaton v. Bell*, 5 Barn. & Ald. 40.

(*k*) *Horsley v. Bell*, Ambl.

A manager of a West Indian estate cannot claim commission whilst he is absent from the island in which the estate lies (*l*): but, though he is not entitled to commission when not personally acting, he is entitled to what he has really paid to others for the management during his absence, provided the payments be in themselves reasonable; as to which, in disputed cases, an inquiry before the Master will be directed (*m*). From the nature of West Indian property, considerable discretion must be left to any one who is appointed manager of an estate there. It may frequently be proper to employ the produce on the spot, instead of remitting it to this country: the security required from him should, therefore, be, either to consign, or otherwise account for, the produce. The security given by a receiver in this country does not relate to the management; but a manager of an estate in the West Indies may, in the discretion given him, make expenditures, without a previous application to the Court; as, by such delay, the estate might be ruined (*n*). Circumstances so different call for the application of different principles. Thus, in the West Indies, a tenant for *life* having supplied the estate with necessaries, a *lien* subsists (it has been determined) after his death, upon the inheritance (*o*). And though it seems, (according to a thin distinction,

What commission allowed for management of West Indian estates.

Nature of the security to be required from the manager of an estate in the West Indies: and the discretion allowed him.

Rules as to *lien*, and claim to priority of payment, in respect of supplies furnished for the use of a West Indian plantation; and necessary expenditure in its management.

773; *S. C.* in note to 1 Br. 101; *Meriel v. Wymondsold*, Hardr. 205. (*m*) *Forrest v. Elwes*, 2 Mer. 70.

(*n*) *Morris v. Elme*, 1 Ves. Jun. 139.

(*l*) *Chambers v. Goldwin*, 9 Ves. 273. (*o*) *Marryat v. Hooke*, cited 14 Ves. 442.

distinction, which Lord Eldon was dissatisfied with), that, neither consignees, nor tenants *in common*, have any such *lien*, yet, all moral justice requires, that, a West Indian estate should be holden subject to the proper expenses of management, in priority to all other claims. And, without reference to colonial Law, or usage; upon principles of natural Equity, a tenant in common of a West Indian estate, must, in respect of necessary expenditure in the management of that property, be credited, in account with the other tenants in common, with allowances that would not be made in the case of an estate to be managed in the ordinary course of husbandry. So, where a person, though not regularly appointed consignee, has been permitted by the owners to receive the consignments, from time to time, he will be allowed all such expenses as could be claimed by a consignee and manager, into whose hands the estate had been duly put by the Court itself(*p*).

(*p*) *Scott v. Nesbitt*, 14 Ves. 444, 447.

CHAPTER VI.

Frauds as between Landlord and Tenant.

UNDER this division of our subject, sundry cases, (not here introduced), might have been properly classed, had not certain particular ingredients, in such cases, made it necessary to arrange them under the heads appropriated to the illustration of those incidents. Whenever any equitable principle, established by decision, with respect to fraud between landlord and tenant, is not found noticed here; if that principle be mixed up with a question as to specific performance, bankruptcy, or other section of our subject separately treated; the reader is referred to such distinctive head; in order to avoid swelling this work by frequent repetitions.

Reference to other sections of this treatise, for many illustrations of the present branch of our subject, not introduced here.

As there is no branch of the jurisdiction of a Court of Equity more delicate than that which goes to restrain the exercise of a *legal* right; such a Court will not relieve against a forfeiture incurred by breach of covenant; unless in a case where clear compensation can be given, by which the party complaining of such breach may have the full benefit of the contract, as originally framed. This doctrine of compensation will not, in the case of forfeiture of a lease by breach of covenant, be extended

Equity will not relieve against a forfeiture incurred by breach of covenant, unless compensation can be made.

The doctrine of compensation will not be extended beyond the case of a

money payment; and to this, only on the very doubtful principle, that, the usual clause of re-entry is merely intended to secure the payment of rent:

the rule, however, is established; and seems, to a certain extent, recognized by statute.

If a *mesne* landlord get relief against a forfeiture, he may enforce the covenants of his sub-tenants.

Proceedings at Law for breaches against which Equity does not relieve, will not

tended beyond the case of a *money payment*, as rent; and this only upon the principle, that, the usual clause of *re-entry* was merely intended to secure the payment of rent (*a*): a principle, (according to the high authority of Lord Eldon,) utterly without foundation (*b*); for subsequent payment, with interest, by no means puts the party in exactly the same situation, as if the rent had been paid at the time stipulated (*c*). But the rule has been long acknowledged, and is now well established: it seems, indeed, recognized, to a certain extent, by the statute of the 4 Geo. 2, c. 28; which, by enacting, that, when a landlord has recovered in ejectment, for non-payment of rent (*d*), the tenant shall be barred from all relief in Equity, *unless* he file his bill within six months after execution perfected; supposes the *previous* right of the tenant to relief. And where a head landlord takes an advantage, at Law, of a forfeiture, incurred by default of payment of rent, by the *mesne* landlord; it does not follow that the under tenants must thereby be totally discharged, and released from their contracts: if the *mesne* landlord succeed in getting relief from the forfeiture, he may enforce the covenants of his sub-tenants (*e*).

Where a landlord is proceeding at common Law, not merely for rent, but, as he professes, also for breach of other covenants, against which the Court of

(*a*) *Wadman v. Calcraft*, 10 Ves. 69.

(*b*) *Hill v. Barclay*, 18 Ves. 58.

(*c*) *Hill v. Barclay*, 16 Ves. 405; *Reynolds v. Pitt*, 19 Ves. 140.

(*d*) See the construction put upon the statute in *Doe v. Masters*, 4 Dowl. & Ryl. 52.

(*e*) *Baker v. Olibeare*, 2 Freem. 92.

of Chancery does not relieve; though his action in ejectment will not be stopped by injunction, he will not be permitted to take out execution upon a verdict for a breach of covenant by non-payment of rent; but, he must proceed on some covenant against the breach of which Equity will not relieve (*f*). This is the rule, where the tenant holds by an actual lease; but where he has only an agreement for a lease, of which contract he seeks the specific performance, by a bill in Equity, praying also that proceedings against him at Law may be stopped; if the answer to his bill establish, that, the lease he seeks must contain a covenant, which has already been violated, of such a nature that the Court of Chancery would not relieve against the breach; the proceedings at Law will not be stayed, in order to enforce performance of the agreement for a lease, which, when executed, the lessor might determine by an ejectment, brought upon a breach against which no relief could be had:—as, for instance, parting with the premises without licence, against which relief is never given (*g*). A parol licence for this purpose is insufficient, unless given as a snare, and under circumstances which amount to fraud (*h*). But, though a Court of Equity will not do so fruitless an act, as to continue an injunction with a view to a specific performance of an agreement which,

be enjoined: but execution upon a verdict for non-payment of rent will be stayed.

Where a lease rests in agreement, proceedings at Law to recover possession will not be stayed; if the lease, when perfected, would contain a covenant which has been broken, of a nature against which Equity does not relieve;

as, parting with the premises without licence.

Though Equity will not execute an agreement for a lease, where it may immediately be set aside;

when

(*f*) *Davis v. West*, 12 Ves. 476. *v. Moreton*, 2 Cha. Ca. 127: see, however, an exception, *Cox v.*

(*g*) *Lovat v. Lard Ranelagh*, 3 Ves. & Bea. 29, 31; *Sanders* *Brown*, 1 Ch. Rep. 170.

v. Pope, 12 Ves. 292; *Davies* (*h*) *Richardson v. Evans*, 3 Mad. 218.

yet, when acts amounting to a waiver of the forfeiture are made out, specific performance of the agreement, and protection against the forfeiture at Law, may be obtained.

when executed, may be immediately put an end to, by a clause of re-entry, which must necessarily be introduced into the lease sought to be obtained (i); the question may be very different, when intermediate acts have passed, amounting to a waiver of the forfeiture: in such a case, the Court would not shut out the tenant from an opportunity of shewing those circumstances which amount in Equity to a waiver; and, if they are made out, may give him the benefit of them, by decreeing a specific performance; and protecting him against the forfeiture at Law (k): but receipt of rent, *alone*, will not amount to a waiver in such case (l).

Alienation once made with licence, determines the condition.

It has been long settled at Law, that, an alienation once made by licence determines the condition; so that no subsequent alienation can give right of entry to the lessor (m): which determination, though termed by Lord Eldon an extraordinary one, has been followed in Equity (n). But where a lease contains a covenant against using premises as a shop, or warehouse, without licence in writing; a mere implied connivance at the carrying on of one particular trade, without the permission of the lessor in writing, can never be held to amount to a general licence for *any* trade: and a Court of Equity will not enter into a comparison as to what trades are most offensive and objectionable.

But, connivance at the carrying on of a particular trade, does not amount to a general licence for any trade.

(i) *Wetherall v. Geering*, 12 Ves. 512.

(k) *Gourlay v. Duke of Somerset*, 1 Ves. & Bea. 73.

(l) *Boardman v. Mostyn*, 6 Ves. 472: see *post*, p. 207.

(m) *Dumpor's case*, 4 Rep. 119; *Hitchcock v. Fox*, 1 Roll's Rep. 70: see *post*, p. 205.

(n) *Brummel v. Macpherson*, 14 Ves. 175; *Jones v. Jones*, 12 Ves. 191.

able (o). And, it is quite clear, a covenant against underletting, will preclude an assignment (p); though the converse does not hold (q).

Effect of covenant against underletting, and of assigning.

Against a forfeiture by breach of covenant to keep the premises insured, a Court of Equity will not relieve (r); nor, according to the latest and preferable authorities, where the forfeiture is incurred by breach of covenant to repair (s). The decisions last referred to, seem to have greatly shaken Lord Erskine's judgment in *Sanders v. Pope* (t); and as to the argument used in support of that case; namely, that, as the premises had not suffered in the mean time, it would be for the advantage of the landlord, that, the money should be laid out, in repairs, at a later period of the lease than that stipulated; Lord Eldon has forcibly observed, that, "the difficulty upon this doctrine is, that there is no mutuality in it. The tenant cannot be compelled to repair. The Court of Chancery (according to Lord Thurlow (u),) would not entertain a bill for that purpose; and is the tenant to have the option, against the will of the landlord, to keep the lease upon those terms; from time to time breaking the covenant which he cannot be compelled to perform? If, the premises

Equity will not relieve against forfeiture by breach of covenant to insure; or to repair.

The case of *Sanders v. Pope* is greatly shaken; or, rather, overruled;

upon this principle, that the tenant cannot be compelled to repair by a Court of Equity, which does not entertain a bill for that purpose; and therefore, there would be no mutuality in relieving the tenant.

having

(o) *Macher v. The Foundling Hospital*, 1 Ves. & Bea. 191.

Meriv. 460; *Reynolds v. Pitt*, 19 Ves. 143.

(p) *Greenaway v. Adams*, 12 Ves. 400.

(s) *Hill v. Barclay*, 18 Ves. 56; *Bracebridge v. Buckley*, 2 Pr. 200.

(q) *Crusoe v. Bugby*, 2 W. Bla. 767; *Boardman v. Mostyn*, 6 Ves. 471.

(t) Reported in 12 Ves. 282.

(r) *Rolfe v. Harris*, 2 Pr. 206, 212; *White v. Warner*, 2

(u) In *Lucas v. Comerford*, 1 Ves. Jun. 235: and see *Moseley v. Virgin*, 3 Ves. 185.

A requisition on the part of the landlord to have the repairs completed, would make the case stronger against the tenant, if he refused to comply: and it is only on the supposition, that, such requisition is necessary, that,

the case of *Sanders v. Pope* can stand, consistently with other decisions upon this subject:

but, it should seem, that, where no stipulation is made for a previous demand of fulfilment, before a forfeiture can be incurred; there no demand is necessary:

having been suffered to fall out of repair, and the landlord making the requisition to repair, the tenant refused to comply; he could have no pretence for applying to a Court of Equity (*w*).” The fact of a *requisition*, on the part of the landlord, to have the repairs completed, would, no doubt, make the case stronger against the tenant, if he should still refuse to comply: but is such requisition necessary? is the landlord bound to exercise such vigilance? and is the tenant, who must be as fully conversant of the covenant by which he has bound himself, as his landlord; and better acquainted, in most cases, with the state of repair of the premises; to wait until he is expressly *called upon* to perform, what he must know is his duty? If these questions are answered in the affirmative, then, indeed, the case of *Sanders v. Pope* may be distinguished from the other determinations upon this subject; and may, perhaps, stand consistently together with them: for in *Sanders v. Pope*, it does not appear, that, there had been any dealing by request and refusal, between the lessor and the lessee, in the period during which, by the express covenant, the money ought to have been applied: and the lessee offered to lay out the full sum, afterwards. But, it should seem, that, where no express stipulation is made in a contract for a previous *demand* of fulfilment, before a forfeiture shall be incurred; there, no demand is necessary: the covenant is, itself, notice; and, in the words of Lord Hardwicke (*x*),

“ where

(*w*) *Hill v. Barclay*, 16 Ves. 405.

(*x*) *Chauncy v. Graydon*, 2 Atk. 619. So, at common Law;

“where nobody is bound to give notice, the parties must themselves take notice.” The rule, that notice must be given to an heir at law, of a condition in a will working a forfeiture (*y*), stands upon a different ground: the heir at law, upon the death of his ancestor, claims by descent, and is not supposed to know of the devise upon condition: but no such ignorance of his obligation can be presumed in favor of a lessee, who has bound himself by his own covenants (*x*).

Since no ignorance of his obligation can be presumed in favor of a lessee, who has bound himself by his own covenants.

Equity, as we have seen, will not relieve against a forfeiture by assignment of a lease, without licence, contrary to covenant (*a*). Nor, where the injury arising from non-performance of a covenant cannot be estimated by damages; or tends to the prejudice of the inheritance, by affording evidence of a prescriptive right of way over the land (*b*).

No relief against forfeiture by assignment, without licence; or breach of covenant in prejudice of the inheritance.

Lord Thurlow, in *Lucas v. Comerford*, before cited, inclined to think, that, the Court of Chancery could no more superintend a rebuilding, than a repair: but his Lordship's words must be considered with reference to the case before him; and, from the report in *Brown* (*c*), it appears, that, the covenant, then under debate, was by no means a clearly

Equity cannot specifically enforce a covenant to rebuild, where such covenant is not a clearly defined one;

to an action of debt upon an award, defendant admitted the arbitrement, but pleaded, in bar to the action, that, plaintiff had not required him to pay the money. The Court adjudged this to be no good plea; that the defendant was bound, at his peril, to pay the money; and that no request was necessary on the part of the plaintiff. *Brett's case*,

Owen, 7.

(*y*) *Burleton v. Humfrey*, Amb. 259.

(*x*) *Bracebridge v. Buckley*, 2 Price, 213; *Doe v. Masters*, 4 Dowl. & Ryl. 45.

(*a*) *Wafer v. Mocatto*, 9 Mod. 112: see *ante*, p. 202.

(*b*) *Descarlett v. Dennett*, 9 Mod. 22.

(*c*) 3 Br. 165.

this would be open to all the objections upon which the Court of Chancery has declined conducting a repair;

but, when the agreement is so distinct, that the Court can describe the building as a subject for the report of a Master, perhaps, specific performance might be decreed.

If the execution of a renewal of a lease for lives be delayed, even by the mutual default of both parties; Equity, when there has been no fraudulent *laches* on the part of the lessee, will give him relief.

a clearly defined one; *no certain sum* was to be laid out; *no particular plan* was agreed upon; and it was only stipulated that the premises should be substantially rebuilt: which contract might call for very different scales of expenditure, according to the different interpretations which might be put on the vague epithet "substantial." The conduct of a rebuilding so undefined, would be open to all the objections upon which the Court of Chancery has declined conducting a repair: and Lord Thurlow's refusal of the application, under such circumstances, is not at all impugned by the qualification laid down by Lord Rosslyn (*d*), (following Lord Hardwicke's opinion (*e*),) that, if the transaction and agreement be clear and explicit, perhaps there would not be much difficulty to decree a specific performance; but, when the agreement is loose and undefined, and it is not expressed, distinctly, what the building is to be, so that the Court could describe it, as a subject for the report of a Master, the jurisdiction could not apply.

If the execution of a renewal of a lease for lives be delayed by the lessor, or even by the *mutual default* of both parties, a Court of Equity, when there has been no fraud, or culpable *laches*, on the part of the lessee, will give him relief: taking care, however, that he nominates lives which were in existence at the time when the renewal ought to have been completed (*f*). This seems the nearest

(*d*) *Moseley v. Virgin*, 3 Ves. 3 Atk. 515.
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(*f*) *Lord Kensington v. Phillips*, 5 Dow, 72; *Pritchard*

est approximation to justice which the case admits; but the advantage is all on the side of the lessee: he has, by such an arrangement, escaped all the casualties which might have occurred in the interval of delay: and though he must not take new lives, it by no means follows, that, the lives he would, originally, have nominated, have not, already, all fallen in.

It has been intimated, that, when a tenant has forfeited his lease by any breach of covenant, and the landlord has recovered against him in ejectment; but, instead of entering into the occupation himself, he permits the tenant to retain the possession; to cultivate the land; and to improve it, perhaps at considerable expense; it would be a fraud, and against conscience, afterwards to dispossess him: and a Court of Equity would be disposed to presume every thing that was necessary to protect the tenant's possession (g). This seems in unison with the cases which have decided, that, a landlord's waiver of forfeiture sets up the lease (h): and as acceptance of rent, with notice of the forfeiture, is a waiver thereof, even at common Law (i); the tenant, by tendering his rent, at the earliest period at which a payment becomes due, may, if it be accepted, thus secure the renewed validity of his lease; or, by its refusal, be put upon his guard against incurring expense. The tenant's equity to

If a landlord, after recovering in ejectment, permit the tenant to continue the occupation, and to be at expense in improvements; Equity will support the tenant's possession:

For, waiver of forfeiture sets up the lease: and acceptance of rent, with notice of the forfeiture, is a waiver thereof.

But, a tenant has no equity to

v. *Ovey*, 1 Jac. & Walk. 404;
O'Herlihy v. Hedges, 1 Sch. &
 Lef. 128.

(h) *Nesbitt v. Tredennick*, 1
 Ba. & Beat. 32: see *ante*, p. 202.

(i) *Roe v. Harrison*, 2 T. R.

(g) *Hume v. Kent*, 1 Ba. &
 Beat. 561.

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be reimbursed, by continuance of occupation, for any expenses prematurely incurred by him, after forfeiture, before a reasonable time allowed for the landlord's re-entry:

such a claim would be less tenable than that of a tenant laying out money, in the expectation of a renewal.

If the person really entitled to possession will encourage the occupier of an estate to expend his money in improvements; it would be fraudulent to turn him out.

The inadequacy of rent reserved, is *less* a badge of fraud in letting charity estates than in other instances.

to be reimbursed, by a continuance of his occupation, for any expenses prematurely incurred, by improvements undertaken after forfeiture, and before a reasonable time allowed for the landlord's re-entry, is quite another question: if that were to be admitted, it might, indeed, justify the sarcastic remark of a learned Judge, that, "it is a common equity to improve a man out of possession of his estate (*k*)."
It would be a less tenable claim, than that of a tenant laying out money, in the *expectation* of a renewal of his term; who cannot, by such means, give the character of a right to his imprudent expectations (*l*). No doubt, if the person really entitled to possession will encourage the occupier of the estate to expend his money in improvements: or, if he will even look on and suffer such expenditure, without apprizing the occupier of his intention to dispute the title to possession, and will afterwards endeavour to avail himself of such fraud; upon this ground of fraud, the jurisdiction of a Court of Equity will attach on the case (*m*).

In letting charity estates, security of the rent is the first object to be regarded; and, in such cases, inadequacy of rent reserved is *less* a badge of fraud than it would be in almost any other instance. A tenant, therefore, who has got a lease of a charity estate at too low a rent, is not to be turned out, if it

(*k*) *Kenney v. Browne*, 3 Ves. 236; *Robertson v. St. Ridgw. P. C.* 519: and see *John*, 2 Br. 140.
Forster v. Hale, 3 Ves. 718.

(*l*) *Pilling v. Armitage*, 12 Ves. 85; *Dann v. Spurrier*, 7
(*m*) *Kenney v. Browne*, 3 Ridgw. P. C. 518; *Norway v. Roe*, 19 Ves. 159; *Matts v. Hawkins*, 5 Taunt. 23.

it appear that he has acted fairly and honestly. The only ground for so dealing with him, would be some evidence of corrupt dealing, or reasonable presumption of collusion. If, for instance, the tenant be a relation of the trustee who has the letting of the estate, that would be a circumstance to justify suspicion (*n*).

A lease granted in consideration of a loan, cannot, on principles of public policy, be allowed to stand; and relief will be given by setting it aside: for Equity considers such leases as obtained, in most cases, by an unfair advantage taken by the lessee of the distresses of the lessor; and to be a mere evasion of the statutes against usury (*o*): which, whatever may be thought of their policy, must not, whilst they remain on the statute book, be counteracted by artful devices. The lessor under such circumstances is, generally speaking, not a free agent (*p*). Still, as the taint of usury, in these cases, is only matter of inference; if it can be clearly made out, that, no advantage has been taken by the lessee; but, on the contrary, that, the circumstances are such as render it unconscionable on the part of the lessor to seek to set aside the transaction; and that it would be a manifest hardship on the lessee; a Court of Equity will not interfere (*q*): otherwise, the doctrine of discountenancing leases coupled with loans might be converted,

A lease granted in consideration of a loan, will, on principles of public policy, be set aside:

the lessor, in such cases, is, generally, not a free agent:

but, if no advantage has been taken by the lessee; and the circumstances render it unconscionable on the part of the lessor to seek to set aside the transaction; Equity will not interfere.

(*n*) *Ex parte Skinner, in re Lamford Charity*, 2 Mer. 457; See the heads of "Trust," and of "Charity."

(*o*) *Morony v. O'Dea*, 1 Ba. & Beat. 116; *Corbet v. Sea-*

grave, 2 Ba. & Beat. 101.

(*p*) *Browne v. O'Dea*, 1 Sch. & Lef. 119; *Drew v. Power*, 1 Sch. & Lef. 193.

(*q*) *Molloy v. Irwin*, 1 Sch. & Lef. 313.

verted, by dishonest landlords, into an instrument of greater fraud than that which it was designed to prevent (*r*).

The assignee of a lease may destroy the privity of estate, by an assignment over:

But, the original lessee, notwithstanding his assignment over, remains liable to all the covenants: with one exception, in favor of a bankrupt lessee, whose assignees accept the lease.

A tenant can only resist payment of rent, by shewing that he has relinquished the possession, legally; or that another tenant has been accepted.

A tenant, by making a parol adverse claim,

The assignee of a lease, who is only liable to the covenants therein contained by privity of estate, may destroy that privity, and with it the consequent liability, by an assignment over (*s*); even to a beggar (*t*). The case is different as to the original lessee, who, notwithstanding his assignment, remains liable to pay the rent and perform his other covenants (*u*): an exception, however, to this rule is created by the statute 49 Geo. 3, c. 121, s. 19, in favor of a bankrupt lessee, whose assignees accept the lease as part of the bankrupt's estate and effects: this clause, of the act cited, was founded on obvious principles of justice; a bankrupt deprived of all property in a lease ought to be relieved from claims upon him in respect thereof (*v*).

When the relation of landlord and tenant has been once established (*w*), the tenant cannot resist a demand of rent, unless he can shew that he was legally entitled to quit the possession, and that he has done so in an unqualified manner; or that the landlord has clearly accepted another person as tenant, in his stead (*x*). On the other hand, a tenant, is not, necessarily, incapacitated from continuing

(*r*) *O'Brien v. Grierson*, 2 Ba. & Bea. 332.

(*s*) *Chancellor v. Poole*, 2 Dougl. 764; *Buckland v. Hall*, 8 Ves. 95.

(*t*) *Pitcher v. Tovey*, 1 Salk. 81; *Taylor v. Shum*, 1 Bos. & Pull. 23.

(*u*) *Staines v. Morris*, 1 Ves. & Bea. 11, 14.

(*v*) *Onslow v. Corrie*, 2 Mad. 346.

(*w*) *Townsend v. Davis*, Forrest's Exch. Rep. 124.

(*x*) *Ward v. Mason*, 9 Price, 294.

timuing to hold possession under a written lease, does not absolutely renounce his tenancy. merely because he has, by parol, asserted an adverse equitable claim to the premises to be vested in himself, but, without absolutely renouncing the relation of tenant (*y*).

There may be a covenant for almost any thing; and a covenant against alienation without licence is as old as *Dumpor's* case (*z*): but this by no means proves such a covenant in a lease to be an usual one. A contract, therefore, for a lease containing the "common and usual" covenants; though, in one case in the Exchequer it was held to embrace a covenant not to underlease, or assign (*a*); has, repeatedly, received a different construction in the Court of Chancery (*b*): though, in other cases it has been considered a proper subject for a reference, and inquiry (*c*).

In the Exchequer, a covenant not to underlease or assign, is held a "common and usual" one; the decisions in Chancery have sometimes been expressly contrary.

A clause, framed to obviate the consequences of bankruptcy, providing that, the lease shall determine upon the bankruptcy of the tenant, is now determined to be legal; and is certainly prudent (*d*). The rights of creditors under a commission (who may have been induced to give credit to the bankrupt on the faith of his known agreement for a lease), afford a principle upon which the assignees may enforce the execution

A clause, that a lease shall terminate on the tenant's bankruptcy, is legal.

Assignees under a commission of bankrupt, may enforce an agreement to grant a lease to the bankrupt; if in writing: but, this is only in favor of creditors.

(*y*) *Rees v. King*, Forrest's Exch. Rep. 22. See *Walters v. Upton*, cited in Coop. 92. 682; *Church v. Brown*, 15 Ves. 264, 271.

(*z*) 4 Rep. 119: See *ante*, pp. 201, 202, 203. (c) *Jones v. Jones*, 12 Ves. 190; *Boardman v. Mostyn*, 6 Ves. 471.

(a) *Folkingham v. Croft*, 3 Anstr. 700. (d) *Church v. Brown*, 15 Ves. 268; *Wetherall v. Geering*, 12 Ves. 512.

(b) *Henderson v. Hay*, 3 Br. 512.

tion of such agreement (*e*); if reduced into writing (*f*): But, where those rights do not interfere, the insolvency of the proposed tenant would be a weighty objection to a specific performance of an agreement for a lease (*g*).

The construction of the actual covenants of a lease, must be the same in Equity as at Law;

The construction of the actual covenants of a lease must be the same in Equity as at Law (*h*); that is to say, every covenant is to be expounded with regard to its context; the exposition must be *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words: proceeding upon this rule, it has been determined, that, if, in consideration of a fine, and certain rent, premises are demised for twenty-one years; and the lessor covenants, that, on request of the lessee before the term expires, he, the lessor, will grant a new lease of the premises, for the like fine; for the like term of twenty-one years, at the like yearly rent, with *all* covenants, grants and articles, as in the then executing indenture are contained: this covenant is satisfied by tendering a new lease containing all the former covenants, except the covenant for *future renewal*. For, it has been held, that, if the continued grant of successive leases, and not a single renewal only, had been intended, words would naturally have been used distinctly marking the right of repeated renewal. A different construction would lead, virtually,

a covenant to grant a new lease, with all the covenants, contained in the then executing indenture, is satisfied by tendering a new lease containing all the covenants in the former, except that for future renewal:

for, a different construction

(*e*) Stat. 49 Geo. 3, c. 121, s. 19. 95; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 130.

(*f*) *Ex parte Sutton*, 2 Rose, 86. (*h*) *Iggulden v. May*, 9 Ves. 329; *Eaton v. Lyon*, 3

(*g*) *Buckland v. Hall*, 8 Ves. 692.

tuallv, to a grant in perpetuity ; and where no consideration appears for a grant of such an extensive nature, this cannot be the reasonable construction. Possible cases may, no doubt, be put, in which such a grant would by no means be unreasonable or absurd ; but in such cases the intention of the parties may easily be expressed, without ambiguity (i) : and where this is not done, a Court of Equity cannot be certain of doing justice by enforcing a contract doubtfully expressed. It is better, even for avoiding fraud, to suffer a party to escape out of a contract which he may have intended to make, where such an agreement is ambiguously expressed, than to enforce it, upon a conjecture that such was the intent of the parties. The Court may fail to do justice in a particular case, by refusing to act upon equivocal words ; but, on the other hand, if they ever went beyond the clear effect of the terms of a contract, this might induce persons who intend fraud, to use ambiguous words, for the purpose of enabling them to accomplish such fraudulent intention (k).

would lead, virtually, to a grant in perpetuity.

Such a grant may, under circumstances, be not unreasonable ; but, then, the intention of the parties must be expressed without ambiguity :

it is better to suffer a party to escape out of a contract which he may have intended to make, than to enforce it upon a conjecture as to the meaning.

The benefit of a covenant for perpetual renewal, on request within a given time previous to the expiration of each then subsisting lease, may be lost by default in making the request within the prescribed period. Possible circumstances may, in

The benefit of a covenant for perpetual renewal may be forfeited, by neglecting to make the request in due time:

(i) *Iggulden v. May*, 7 East, 242 ; *S. C.* 9 Ves. 330 ; *Willan v. Willan*, 16 Ves. 84 ; *Moore v. Foley*, 6 Ves. 237 ; *Baynham v. Guy's Hospital*, 3 Ves. 298 ; *Tritton v. Foote*, 2 Cox, 174 ; *Hyde v. Skinner*, 2 P. Wms. 197 ; *Kirkham v. Chadwick*, 13 Ves. 549, 551.
(k) *Harnett v. Yielding*, 2 Sch. & Lef. 558.

a lessee can never have the option of enforcing the contract when he pleases, leaving himself, in the mean time, free.

in particular cases; excuse the *laches*; but, generally speaking, the lessor cannot continue bound by such covenant, upon the tardy application of a lessee who has neglected the conditions with which it was coupled. There would be no mutuality in such a dealing, if it were left to the option of the lessee alone to enforce the contract when he pleased, but to leave himself free as long as he found it convenient (*l*).

Interests carved out of an old lease must not be destroyed by taking a new one.

The legal effect of taking a new lease is a surrender of the old one; but, to some intents, a renewed lease may be considered as a continuance of the original lease;—that is, for the protection of legal interests carved out of it: which, when once well created, the Law does not permit to be destroyed (*m*).

If a tenant for life, not having a special leasing power, grant a lease for ninety-nine years, determinable upon three lives, with a covenant to substitute a new life, when one drops; the covenant will not be binding on the lessor's son, who succeeds as remainder-man;

If a tenant for life, not having a special leasing power, grant a lease for ninety-nine years, determinable upon three lives, with a covenant that, upon the death of any one of the persons on whose lives the lease is held, he will, on request being made, grant a new lease, for another term of ninety-nine years, determinable with the life of an additional person to be substituted in the place of the party deceased, such renewed lease to be held under the same yearly rent, covenants, conditions, and agreements as in the then executing demise mentioned; these covenants and obligations of the tenant for life will, of course, not be binding upon his son, who upon his father's decease succeeds to the

(*l*) *The City of London v. Mitford*, 14 Ves. 58.

(*m*) *Collett v. Hooper*, 13 Ves. 260.

the estate, not as heir or claiming through his father, but as a remainder-man under a settlement. Nor will the son's assent to the terms of the agreement, if indorsed on such lease, subsequently to its execution, be binding on the son: such indorsement will be considered as a mere memorandum, quite as distinct from the lease, as if it had been written on a separate parchment: at best, it can only be a voluntary gratuitous consent to the lease, and, as being without consideration, a mere *nudum pactum*, even if it was not extorted by an undue exercise of the father's influence. Had the son, indeed, by fraudulently holding out expectations which he did not intend to fulfil, induced the lessee to come into terms which he would otherwise not have agreed to, such conduct would have raised an equity against the son: but, in the case put, it is clear no such fraud could have been practised; the lessee having first taken a lease to which the son was no party, and the invalidity of the covenants whereof, to bind the son, the lessee shewed his perfect knowledge of, by the very act of obtaining the son's subsequent gratuitous, and therefore inoperative, assent (n).

even although his assent to the agreement be indorsed on such lease, subsequently to its execution:

Had the son, indeed, whilst the treaty for lease was depending, induced the lessee to come into terms which he would not otherwise have agreed to; such conduct would have raised an equity against the son.

If a tenant be in arrear for rent, and also indebted both to his landlord, and to another person for sums due by simple contract: and the landlord agree in writing, that, if the tenant will give up the occupation of the premises, in respect of which the rent is due, and also execute a bill of sale of all his effects;

If a landlord agree, in consideration of a surrender of premises by his tenant, and a bill of sale of his effects; to discharge a debt due from the tenant to another; this promise,

(n) *Dowling v. Mill*, 1 Mad. 48: and see *Waring v. Mackreth*, Forrester's Exch. Rep. 137.
549; *Hunt v. Carew*, Nels.

though not made to that creditor himself, raises a trust in his favor, which Equity will enforce:

If the landlord, before the other creditor is aware of such agreement, propose different terms to him, acceptance thereof will not be binding.

A note given to prevent a sale under a distress, must be first discharged by the proceeds of a subsequent distress.

effects; he, the landlord, will discharge the specified debt of the other creditor by simple contract, in the first instance; this is such an agreement as a Court of Equity will specifically execute. The engagement of the landlord to discharge the amount stated to be due to the other, named, creditor; though not made to that creditor himself, raises a good trust for him, to the extent stipulated for: to claim a larger sum, as being that actually due, would be a fraud on the landlord. On the other hand, if the landlord, after having entered into such an agreement with his tenant, but before the other creditor is aware of it, propose different terms to that creditor, which are accepted, in the absence of all information as to the first concluded arrangement; this would be fraudulent on the part of the landlord; and the acceptance of the second proposal, under such circumstances, would be no bar to the other creditor's recurring to the first, and more advantageous, agreement (o).

When a landlord has distrained for rent, and the tenant, in order to prevent a sale, has given a promissory note for the arrears then due; in which note a third person has joined, as security, should the landlord distrain again for rent accruing due after the period to which the note referred; if the proceeds of such second distress be not sufficient to satisfy both the demand in respect of the promissory note, and also the rent subsequently accrued, they must be first applied in discharge of the note, or rather of the debt for which the note was given: since, whilst such note remained unpaid,

(o) *Gregory v. Williams*, 3 Meriv. 588.

paid, it was merely a collateral security, not affecting the landlord's remedy by distress (*p*). If a bill has been filed to restrain a landlord from distraining for rent, should it appear, by production of the attachment, that the landlord is in contempt for not answering, upon a proper *affidavit* of the merits of the case, an injunction may issue before answer (*q*).

Injunction against distress for rent.

With respect to a tenant's right to dispose of manure, straw, &c. off the premises, the custom of the country may be an important consideration (*r*), where those points have not been provided for by contract (*s*); but, the question can have no place where there has been a written agreement. And where the terms of such an agreement are, that the in-coming tenant shall manage the estate according to the mode, and quit it in the condition, in which the immediately preceding tenant managed and quitted it; this must be understood to mean,—as the landlord himself permitted them to manage and quit. The preceding tenants may have agreed to abide by and perform the covenants of a lease expired precedently to their tenancy; but, even supposing the in-coming tenant to have been aware of those covenants and that agreement, still, his engagement was only to manage and quit the estate, as his immediate precursors in the tenancy had, by the landlord's permission, actually managed and quitted the premises: and if *they* were suf-

A tenant's right to carry manure and produce off the premises, depends on the custom of the country, when there has been no written agreement.

An agreement that an in-coming tenant shall manage a farm, and quit it, as the preceding tenant managed and quitted it; means—as the landlord permitted it to be actually managed and quitted: not that covenants which, though entered into, were never enforced against the old tenants, shall be insisted on against the new tenant.

ferred

(*p*) *Palfrey v. Baker*, 3 Price, 574.

(*r*) *Onslow v. —*, 16 Ves. 174. See next chapter.

(*q*) *Heming v. Emuss*, 1 Price, 386.

(*s*) *Kimpton v. Eve*, 2 Ves. & Bea. 353.

ferred to remove, and did remove, manure, straw, &c. off the lands, the in-coming tenant has a right to do the same. The landlord, under such circumstances, has estopped himself from complaining of acts which have grown out of his own permission, and are no violation of the in-coming tenant's agreement (*t*).

In what case a decree in the nature of *quia timet* may be had against a tenant.

If a tenant covenant to leave stock of a certain amount upon the premises, should a fair ground of suspicion arise that he does not mean to perform his covenant in that respect; although compensation in damages might be had for a breach, yet, the agreement having relation to the sort of enjoyment for which the landlord has stipulated, after the expiration of the term; a decree in the nature of *quia timet* may, it seems, be obtained (*u*).

The assignees of an insolvent tenant cannot deal with the crops otherwise than the tenant might lawfully have done.

And, by a statute (*v*) passed for the promotion of good husbandry, and for preserving covenants between the owners and occupiers of land let to farm, it is enacted, that, in case the tenants should become insolvent, their assignees shall not deal with the crops on the farm otherwise than the tenant might lawfully have done: but this act does not bind the Crown, when the crops are seized under prerogative process (*w*).

A tenant covenanting to repair, except in case of damage by fire, cannot evade an

A tenant who has entered into a covenant to repair, with an exception in case of damage by fire; cannot, by force of this exception, (should such an

(*t*) *Liebenrood v. Vines*, 1 Meriv. 18.

(*v*) Stat. 56 Geo. 3, c. 50, s. 11.

(*u*) *Ward v. Duke of Buckingham*, cited 10 Ves. 161; *S. C.* 3 Br. P. C. 93, (fol. edit.)

(*w*) *The King v. Osbourne*, 6 Price, 98.

an accident happen), protect himself, either at Law (*x*), or in Equity (*y*), against the effect of a separate, independent, covenant to pay the rent during the term. And where the tenant has bound himself, in general terms, to leave the premises in good repair; if a casualty by fire occur, he must rebuild (*z*).

independent covenant to pay the rent during the term, should the premises be burnt; and the tenant, who has bound himself to leave the premises in repair, must rebuild, if casualty by fire occur.

If a conveyance be executed by a person out of possession, to a person who, at the time, holds part of the estate, so conveyed, under a lease from the party through whom those in possession claim; the parties to the conveyance will be deemed guilty of a fraud; the person obtaining it having notice that the property was claimed by another, and being himself in possession under the title of that other. The covin would avoid the transaction even at common Law (*a*). A Court of Equity will never permit the relative situation of landlord and tenant to be fraudulently made use of, to protect rights adverse to that relation. When, therefore, by default of the landlord, judgment in ejectment has passed against him, and the tenant has attorned to the party who recovered; should a new ejectment be brought by the landlord, it would be held against conscience for the tenant to set up his lease, not for the purpose of protecting his own possession, but, for the purpose of excluding the landlord from whom he received his lease; and

A man must not accept a conveyance from one out of possession, when he holds part of the estate so conveyed, as tenant under a third person claiming by adverse title:

the relative situation of landlord and tenant must not be made use of, to protect rights adverse to that relation.

(*x*) *Doe v. Sandham*, 1 T. R. 710.

(*z*) *Pym v. Blackburn*, 3 Ves. 88.

(*y*) *Holtzapfell v. Baker*, 18 Ves. 119; *Hare v. Groves*, 3 Anstr. 693, 699.

(*a*) *Underwood v. Lord Courtown*, 2 Sch. & Lef. 63.

and to support the title of those to whom he has attorned, against his landlord. Before a new ejectment is brought, a bill may be filed to restrain the lease from being set up, as a defence on the trial at Law; and the injunction will be extended, not only to the tenant, but, to any third person who might take advantage of the tenant's improper act (*b*). It would be equally inadmissible, as a general principle, that a tenant should be at liberty to file an interpleading bill against his landlord, merely on the ground that a stranger sets up an adverse title to the estate (*c*): for, it would be extremely mischievous; if a tenant were allowed, (in his own right, or that of others,) to call in question the title of the person under whom he holds (*d*). But, this general rule has exceptions; for instance, where the landlord has by his own act given a color of title to another, subsequently to the lease, he may thereby have entangled the tenant in embarrassments, which a bill of interpleader may be the most proper mode of quieting (*e*).

A tenant cannot file an interpleading bill against, or question the title of, his landlord: unless the landlord has, subsequently to the lease, given color of title to another.

A person is not remitted to his mere right, when he obtains a qualified possession by contract:

but Equity might interfere, if a par-

If a person having the mere right obtain a qualified possession by contract, he cannot be remitted to his mere right; but must hold the possession according to the title of the party from whom he, unwisely, received it by such contract, instead of recovering it by lawful means (*f*). A Court of

Equity

(*b*) *Baker v. Mellish*, 10 Ves. 531; *Homan v. Moore*, 4 Price, 550, 553; *Saunders v. Lord* 7.

Annesley, 2 Sch. & Lef. 96.

(*e*) *Cowtan v. Williams*, 9

(*c*) *Dungey v. Angrove*, 2 Ves. Jun. 304; *Johnson v. At-*

Ves, 107; *Clarke v. Byne*, 13 Ves. 386.

kinson, 3 Anstr. 800.

(*f*) *Saunders v. Lord An-*

(*d*) *Smith v. Target*, 2 Anstr.

nesley, 2 Sch. & Lef. 103, 98.

Equity would, indeed, interfere, in a case where it was indisputably clear, that, the fee simple was in a party who had been induced by fraud to accept a chattel interest from the person holding tortious possession of the estate (*g*).

ty clearly entitled to the fee simple were induced, by fraud, to accept a chattel interest.

Where tenants, by agreements between themselves, throw difficulties in the way of the landlord's title, he has a just claim to the assistance of Equity to enable him to recover possession when the leases shall expire (*h*).

Where tenants throw difficulties in the way of a landlord's title; Equity will aid him.

The fraudulent act of a tenant, betraying the possession of his landlord, by disclaiming tenure under him, and admitting title in a third person, will not affect the landlord's title, so long as he has a right to consider the person holding possession as his tenant (*i*). But, as he has a right to punish the act of the tenant in disavowing the tenure, by proceeding to eject him notwithstanding his lease; if he will not proceed for the forfeiture, he may, by acquiescence, lose the right to affect the claims of third persons; for there must be a limitation to demands, on the ground that the possession was betrayed, as well as in all other cases (*k*).

A tenant's fraudulent admission of title in a third person, will not affect the title of the landlord, so long as he has a right to consider the person holding as his tenant.

Where an ejectment has been brought, at the trial of which the tenant has made default; and is employing the interval of possession, thus secured, in doing all the mischief in his power, by committing wilful waste upon, or removing manure away from,

A tenant who makes default at a trial in ejectment, may be restrained from employing the interval of possession, so secured, in committing waste.

(*g*) *S. C.* p. 101.

Price, 154.

(*h*) *S. C.* p. 108.

(*k*) *Hovenden v. Lord Annes-*

(*i*) *Meredith v. Gilpin*, 6 *Sch. & Lef.* 625.

from, the estate; he will be restrained by injunction (l).

Demise of copyhold for one year, and at the end thereof for a longer term, if the lord will give licence:

the lord may evict the tenant, if he has purchased the copyholder's interest, though with knowledge of the terms of the demise.

Whatever remedy is reserved to a landlord, in case the tenant be in arrear to a certain amount, Equity will not relieve; if the landlord make an affidavit, that the sum fixed is due.

Land demised, with a proviso, that, if wanted for building, it shall be given up; can-

A demise of copyhold lands for one year, and at the end of that term for thirteen years more, if the lord will give licence, is, in the first instance, only a lease from year to year, not working a forfeiture, where, by custom, a lease for fourteen years would have that effect. And as the licence of the lord is, in the case put, a condition precedent; if that licence be not granted, ejectment may be maintained at the end of the year. Nor will any equity arise, in favor of the tenant, from the fact that the lord has, with knowledge of the terms of the demise, purchased the copyholder's interest; but he may evict the tenant in possession (m).

A Court of Equity is never disposed to interfere, *brevi manu*, between landlord and tenant; and if any remedy has been reserved to a landlord, by covenant, whenever the tenant shall be in arrear to a certain amount; the Court will not interfere, if a clear, distinct, affidavit be produced, that the particular sum is due: but, if the landlord will not make such an affidavit, the defendant may obtain such relief as the case appears to require (n).

If a lease contain a proviso, that, should the land be wanted for building, the tenant shall deliver up possession; the landlord cannot, in Equity,

(l) *Lathrop v. Marsh*, 5 Ves. 261; *Pulteney v. Shelton*, 5 Ves. 260, note: see the next chapter.

(m) *Lufkin v. Nunn*, 11 Ves. 174.

(n) *Nutbrown v. Thornton*, 10 Ves. 162.

ty, enforce this stipulation on the mere ground of having entered into a *treaty* to demise the land for the purpose of being built upon; without alleging any actual agreement to that effect (o). But, when by covenant it has been stipulated, that, the landlord may resume any part of the demised premises, should he be "minded" to set, or sell, the same for building upon; and he has actually resumed the premises, with a *bond fide* intention to build; the tenants will have no equity to recover the same, although that intention should not be finally acted upon (p).

not be resumed upon a mere treaty for granting a building lease.

If a man take a lease of lands adjoining to his dwelling-house, and, with the consent of the lessor, throw part of the demised premises into his ornamental grounds, going to considerable expense in permanent improvements, in planting and otherwise; though the lessor may have reserved, in the amplest manner, all trees, and timber-like trees, and all shrubs that may be planted on the premises; yet, after having stood by and seen the improvements going forward, giving at least an implied assent to them, he will be enjoined from injuring the beauty of the grounds, by cutting down the trees (q): for, where a man encourages another to lay out money, upon the supposition that he never means to exercise his legal rights, Equity will not permit him to exercise them (r).

A reservation of all trees and shrubs, will not authorize a lessor to cut down trees, the planting of which, for ornament, he has encouraged.

The rule of Law, that, whatever is fixed to the freehold

What chattels put up by a ten-

(o) *Russell v. Coggins*, 8 Ves. 34.

(q) *Jackson v. Cator*, 5 Ves. 691.

(p) *Gough v. Birmingham Canal Company*, 6 Ves. 362.

(r) *Brydges v. Kilburne*, 5 Ves. 689.

ant, may be removed by him; although they have been fixed to the freehold:

buildings, though erected for purposes of trade, cannot be removed by a lessee who has covenanted to repair generally.

Cattle *levant* and *couchant* on the lands are distrainable for rent; unless left there by the management of the landlord.

Any person assisting in the re-

freehold becomes, by annexation, part of it (*s*); has in modern times received a less rigid construction than formerly: as between landlord and tenant, the latter may, during the term, remove such chimney pieces, and similar articles, and generally all such engines, and instruments of trade, as he has himself put up (*t*). Buildings, however, though erected for purposes of trade, under a lease containing a covenant to repair all buildings and erections, cannot be removed by the lessee, when the covenant is general, and contains no exception. The rule appears very reasonable; for, the expectation that buildings will be erected during the term, and be left on the premises at its expiration, may have formed the inducement for granting the lease, and have entered, as a considerable ingredient, into the estimate of the rent to be reserved (*u*).

Cattle which have been *levant* and *couchant* upon the lands, are distrainable for the rent in arrears (*x*): but, if the landlord have, by any fraud and subtlety, induced the owners of the cattle to leave them for a night on the land, even should the distress be supported at Law, (which, under such circumstances, seems doubtful (*y*),) relief may be had in Equity (*z*).

On the other hand, any person who assists a tenant

(*s*) Co. Litt. 53, a.

(*t*) *Lawton v. Lawton*, 3 Atk.

14.

(*u*) *Thresher v. East London Water-works Company*, 2 Barn. & Cressw. 614; *Naylor v. Collinge*, 1 Taunt. 21.

(*x*) *Fowkes v. Joyce*, 3 Lev.

260.

(*y*) See Serjt. William's 7th note to *Poole v. Longueville*, 2 Saund. 290.

(*z*) *Fowkes v. Joyce*, Prec. in Cha. 7.

ant in fraudulently (*a*) removing any chattels whatever from the demised premises, with intent to prevent the landlord from distraining for rent, is, by statute (*b*), answerable for the double value of the articles so removed; and although the statute authorizes an application to two magistrates, who are enabled to make a summary order when the value is under £50, yet, this clause is only for the easier relief of the party injured, and does not oust the jurisdiction of the superior Courts, if the landlord prefer bringing the case before them (*c*).

moval of chattels from demised premises, to prevent their being distrained for rent, is liable for the double value.

And if a late tenant, not being entitled to an off-going crop, and having sown what he has no right to reap, enter upon the land after the expiration of his term, and cut and carry away corn; the landlord, it seems, (if he has reserved the crop, in the grant of a new lease,) may either bring ejectment and an action for *mesne* profits; or, if he prefer that mode of proceeding, trover will lie (*d*): and we have already seen, that, wherever trover would lie at common Law, the case must be one which may, properly, be dealt with in Equity (*e*).

(*a*) 11 Geo. 2, c. 19: see sect. 4. Price, 310.

(*b*) *Opperman v. Smith*, 4 Dowl. & Ryl. 35.

(*d*) *Davies v. Connop*, 1 Price, 58.

(*c*) *Stanley v. Wharton*, 9

(*e*) *Ante*, p. 166.

CHAPTER VII.

Fraud in committing Waste; or acts in the nature of Waste.

The legal remedies, whether at common Law, or by statute, afford no adequate preventive security against the commission of waste:

the mischief must have been actually done before the Law can be called into operation:

The threatened, as well as actual, commission of waste, of whatever kind, is, therefore, a frequent ground for the interference of Equity.

PERSONS having only limited interests in real estates, may, by committing waste upon the premises, fraudulently, or maliciously, cause irreparable mischief to those in remainder, or reversion. The legal remedies under the common Law, as well as those specially given by the statutes of Marlebridge (*a*), and of Gloucester (*b*), are imperfect; as not authorizing effectual preventive interference. The last cited statute does, indeed, give treble damages, and the forfeiture of the place wasted by tenants for life, or years, or by the court-
esy: But the mischief must have been first done, before the act can be called into operation; and, after all, the compensation may be utterly inadequate, and the damages awarded lost, by the insolvency of the defendant.

The threatened (*c*), as well as actual, commission of waste, therefore, of every kind;—and that not merely in cases strictly admitting this description, but, also, in those which are cases of waste in fact, though, in correct technical denomination, they

(*a*) Stat. 52 Hen. 3, c. 23.

(*b*) Stat. 6 Edw. 1, c. 5.

(*c*) *Gibson v. Smith*, 2 Atk. 182.

they are rather to be termed *trespasses* under color of right (*d*);—is a frequent, and undisputed, ground for the interference of Courts of Equity, by injunction; even in cases of which Courts of common Law would, eventually, if the waste were actually committed, have jurisdiction. Courts of Equity will, moreover, upon doctrines peculiar to those Courts, but founded on the clearest principles, restrain the exercise of, what is (perhaps by a little solecism in language, but emphatically,) termed *equitable waste* (*e*).

Courts of Equity will, also, restrain the commission of, what is termed, *equitable waste*.

In the case, also, of co-parceners and tenants in common, with regard to whose acts of waste, as between themselves, the common Law has provided no remedy; Courts of Equity will interfere, when it appears that waste has been committed, or is threatened, by one tenant in common, who has, by contract, become the occupying tenant of the other; and who is consequently bound to treat the land as any other occupying tenant should treat it (*f*): and a tenant in common, though not bound by any contract or agreement; may be restrained, by injunction, from committing acts amounting to the destruction of the property (*g*); but prospective relief cannot be given against apprehended acts of pure equitable waste (*h*): the remedy of a

With regard to acts of waste between co-partners, and tenants in common, no legal remedy is provided: but, in certain cases, Equity will provide one,

and, in all cases, restrain acts amounting to destruction: but, prospective relief will not be given against acts of pure equitable waste.

tenant

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| (<i>d</i>) <i>Mitchell v. Dors</i> , 6 Ves. 147; <i>Hanson v. Gardiner</i> , 7 Ves. 308; <i>Crockford v. Alexander</i> , 15 Ves. 138; <i>Earl Cowper v. Baker</i> , 17 Ves. 128; <i>Thomas v. Oakley</i> , 18 Ves. 186; <i>De Salis v. Crossan</i> , 1 Ba. & Beat. 188. | (<i>e</i>) <i>Burgess v. Lamb</i> , 16 Ves. 177: see instances, <i>infra</i> .
(<i>f</i>) <i>Twort v. Twort</i> , 16 Ves. 182.
(<i>g</i>) <i>Hole v. Thomas</i> , 7 Ves. 589.
(<i>h</i>) <i>Smallman v. Onions</i> , 3 Br. 622. |
|---|--|

tenant in common, who has reason to fear injury of this kind, is to apply for a partition (i).

An injunction to stay waste may be had on motion, before answer; by filing a bill with a proper prayer, and supported by *affidavit*:

or, in urgent cases, when a motion cannot be made, on petition:

As the fraudulent, or injurious commission of waste, can, in many instances, only be prevented by the utmost promptitude of interference, an injunction will, on motion, be granted before answer, on filing the bill, with a proper prayer (k), and shewing, by *affidavit*, that waste is likely to be committed (l): And, in urgent cases, between the seals, or in the long vacation when the Court of Chancery is not sitting, and no motion can be made; if a bill be filed, stating a case of waste, and supported by an *affidavit* of the facts; the Lord Chancellor will, upon petition, grant an injunction (m).

but, if the injunction be applied for, and issued, as for default of appearance, when, in fact, an appearance has been entered; the order must be discharged.

But, although, in cases in the nature of waste, an injunction may be granted *ex parte*, and without notice, even after the defendant has appeared; as, otherwise, irreparable mischief might be done in the interval between entering an appearance, and the time when the motion could be made on notice (n); yet, if an injunction has been obtained for default of appearance, when in fact an appearance has been entered, the order must be discharged, or there would be a contradiction on the records of the Court (o). And where an injunction to

The *affidavit* in support of a

(i) *Goodwyn v. Spray*, 2 Dick. 667.

(k) *Wright v. Atkins*, 1 Ves. & Bea. 314; *Savory v. Dyer*, Ambl. 70.

(l) *Anonym.* 1 Ves. Senr. 476; *Attorney General v. Johnson*, 2 Wils. Ch. Ca. 96.

(m) *Kimpton v. Eve*, 2 Ves. & Bea. 351; *Temple v. Bank of England*, 6 Ves. 771; *Mayor of London v. Bolt*, 5 Ves. 130.

(n) *Aller v. Jones*, 15 Ves. 605.

(o) *Harrison v. Cockerell*, 3 Meriv. 2.

to stay waste is moved for, the *affidavit*, in support of the motion, must set forth an express title; not an hypothetical title, resting upon the plaintiff's information and belief (*p*): an injunction obtained on such vague grounds, instead of preventing fraud, might operate a fraudulent privation, for a time at least, of the free and just exercise of property, by the absolute owner.

motion for an injunction to stay waste, must set forth an express title.

Whilst an heir at law and a devisee are litigating their adverse rights in a Court of Law; neither of them can sustain a bill in Equity, for an injunction, to restrain waste, spoil, or destruction, by the other party, of the property, the title to which is under contest (*q*). So, if an heir get into possession of an equitable estate, in respect of which an ejectment cannot be maintained; should a bill be filed by a person alleging himself to be devisee, in order to try his title, and to restrain waste; if the heir, by his answer, positively deny the will, and insist on his own title, an injunction will be refused. The question of disputed title must be first disposed of, by the proper jurisdiction. Upon the same principle, where, to a bill by the heir, against a devisee in possession, to stay waste; the answer stated, that, the will under which the defendant claimed was duly executed and attested; an injunction, granted before answer, was dissolved (*r*).

Whilst parties are litigating their adverse rights in a Court of Law, neither of them can sustain a bill for an injunction, to restrain waste by the other party:

Thus, an application, by a person alleging himself to be devisee, for an injunction to restrain waste, cannot be granted against the heir in possession, who positively denies the devise:

nor could the heir have an injunction against a devisee in possession, who insisted, that, the will was duly executed and attested.

In a case, where the defendant to a bill to stay waste

Where the defendant to a bill

(*p*) *Whitelegg v. Whitelegg*, 173; *Pillsworth v. Hopton*, 6 1 Br. 57; *Davies v. Leo*, 6 Ves. 52.
Ves. 787.

(*r*) *Anonym.* cited in *Norway*

(*q*) *Jones v. Jones*, 3 Meriv. v. *Rowe*, 19 Ves. 155.

to stay waste states, that, he is in possession by a title of his own; but admits he was let into possession by the plaintiff's tenant; the defendant's title will, for this purpose, be held no better than that of the tenant.

waste stated, that, he was in possession of the estate by a title of his own; but admitted, that, he was let into possession by the plaintiff's tenant, in breach of his duty to his landlord; it was held, that, the defendant's title was, for this purpose, to be taken as no better than the tenant's: and, though a Court of Equity would not have interfered, if the defendant had obtained possession without participating in the tenant's breach of duty; yet, he could not be permitted to avail himself of a possession so improperly obtained; and, on that ground, he was restrained (*s*).

Affidavits supporting a motion, in opposition to a defendant's answer, are, sometimes, permitted to be read in cases of waste, when they do not go to the question of title, but are confined to the fact of waste:

Although in general cases *affidavits* are not permitted to be read to support a motion, and in opposition to a defendant's answer; yet this is allowed in cases of alleged waste; with one qualification, namely, that, the plaintiff's *affidavits* must not go to the question of title, but be confined to the question of fact as to waste (*t*). Obvious policy requires the above-stated occasional exception to the general rule; as otherwise a fraudulent and malicious defendant might, by adding perjury to the commission of waste, continue to perpetrate irremediable mischief; and, when he had done so, abscond from justice.

but, generally, such *affidavits* should be made

On the other hand, the general rule is, that, a plaintiff is not to wait till the defendant's answer comes

(*s*) *Anonym.* cited 19 Ves. 154: the collusion of the tenant is always considered a strong additional reason for granting the writ; *Courthope v. Maplesden*, 10 Ves. 291.

(*t*) *Morphett v. Jones*, 19 Ves. 351; *Norway v. Rowe*, *ibid.* 153; *Countess of Strathmore v. Bowes*, 1 Cox, 264; *Peacock v. Peacock*, 16 Ves. 51.

comes in, and, instead of supporting his bill by *affidavit* when he files it, first see the defence; and then treat his bill as one in restraint of waste, and file supplemental *affidavits* in support of it (u). The defendant is entitled, before he answers, to be apprized of the points on which the plaintiff rests his case: if the bill be supported, when filed, by a statement of particular facts on *affidavit*, the defendant has an opportunity of explaining, or denying, those facts in his answer; but if the plaintiff reserve his *affidavits* till the answer is filed, he deals not altogether fairly with the defendant; and such *affidavits* cannot be read in support of an injunction: Of course, however, acts of waste done subsequently to the filing of the bill would be entitled to a distinct consideration (x). And where allegations in an injunction bill, as to the acts of the parties, have neither been admitted, nor denied, in the answer; there can be no surprise on the defendant; and it should seem, that, *affidavits*, in support of those allegations, may be read, though they were not filed till after the answer was put in (y).

when the bill is filed; a plaintiff is not to wait to see the defence, and then file supplemental *affidavits* in support of his bill:

affidavits reserved till the defendant has no opportunity of denying them cannot be read: unless they refer to acts of waste committed after bill filed:

affidavits in support of allegations neither admitted nor denied, may be read, though not filed till after the answer was put in.

A threat to commit waste affords, as we have seen (z), sufficient ground for an injunction: but, though it is not necessary for a plaintiff to wait till the waste is actually committed, where the intention appears, and, more particularly, when the defendant,

When the intention to do waste appears, plaintiff need not wait till the waste is committed, before he applies for an injunction:

(u) *Lamson v. Morgan*, 1 Meriv. 11; *Jefferies v. Smith*, 1 Jac. & Walk. 300. Price, 306.

(x) *Smythe v. Smythe*, 1 Swanst. 253. (z) *Ante*, citing *Gibson v. Smith*, 2 Atk. 182.

(y) *Morgan v. Goode*, 3

defendant, by his answer, insists on his right to do the acts complained of; yet, an injunction cannot be had upon the mere apprehension, that, the defendant means to do mischief, when he positively denies any such intention; the plaintiff must bring forward some fact, or threat; not allege mere belief (*a*).

Trustees to support contingent remainders may bring a bill to restrain the tenant for life from committing waste:

Bill to stay waste on behalf of an infant *en ventre*.

Notwithstanding an intermediate estate for life, an ulterior remainder-man in fee may sustain a bill to restrain the tenant for life, in immediate possession, from committing waste:

although the intermediate remainder-man for life be punishable for waste.

Where a tenant for life, subject to impeachment for waste, commits waste of any kind; Courts of Equity will interfere by injunction; although, in consequence of the immediate remainder not being vested, no action could be maintained at common Law: the trustees to support contingent remainders may sustain a bill to stay waste by the tenant for life (*b*). So, a bill may be brought on behalf of an infant *en ventre sa mere* to stay waste (*c*). And where there is tenant for life, remainder for life, remainder in fee, a Court of Equity, on a bill brought by the remainder-man in fee, to stay waste by the tenant for life; will, notwithstanding the intermediate estate for life, if the fact of waste is established, grant an injunction (*d*): otherwise, by fraudulent collusion between the tenants for life, the estate in fee might, in many instances, become almost worthless. It will make no difference, in the case last put, to urge, that, the remainder-man for life was punishable for waste; he will not, in Equity, be permitted to make an agreement to the

(*a*) *Hanson v. Gardiner*, 7 Ves. 309.

(*b*) *Perrot v. Perrot*, 3 Atk. 95; *Stansfield v. Habergham*, 10 Ves. 284.

(*c*) *Hale v. Hale*, Prec. in Cha. 50; *Garth v. Cotton*, 1 Dick. 198.

(*d*) *Farrant v. Lovell*, 3 Atk. 722.

the prejudice of the remainder in fee; as such agreement, if entered into before his power to commit waste commences, must be considered fraudulent (*e*).

And if trustees to preserve contingent remainders, colluding with the tenant for life, permit him to commit waste, in fraud of the remainders, they will be responsible for breach of trust (*f*). Nor will the tenant for life of an equitable estate be permitted, by the destruction of that estate, to bring forward a remainder; thereby enabling himself to commit waste; and where there is an executory devise over, even of a legal estate, a Court of Equity will not permit timber to be cut down, or other waste to be committed; of course, this will be still less admissible where the executory devise over is of a trust estate. Upon this subject, Equity has greatly abridged legal rights; but, if such protection were not given, it would be easy to defeat the intention in almost every settlement (*g*).

A lessee who commits, or threatens to commit, waste, may, upon a bill filed by the landlord, be restrained by injunction; and if the defendant abscond, in order to avoid service of the injunction, service on his wife will be held good service (*h*). It must be understood, however, that, in order to entitle

If trustees, to preserve contingent remainders, connive at waste by the tenant for life, they will be answerable.

Tenant for life of an equitable estate must not bring forward a remainder, enabling himself to commit waste; and where there is an executory devise over, even of a legal estate, Equity will not permit waste to be committed.

What service of an injunction against waste, is good.

What acts entitle a landlord

(*e*) *Robinson v. Litton*, 3 Atk. 210.

(*f*) *Garth v. Cotton*, 3 Atk. 753.

(*g*) *Stansfield v. Habergham*, 10 Ves. 278.

(*h*) *Onslow v. ———*, 16 Ves. 173; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106; *Drury v. Molins*, 6 Ves. 328; *Sir W. Pulteney v. Shelton*, 5 Ves. 147.

to the summary relief of an injunction.

entitle the plaintiff to the summary relief of an injunction, the acts complained of must, in themselves, be clear acts of waste; or in contravention of express covenant; or agreement to be inferred from the course of dealing between the parties (*i*):

And what sort of questions are more fit for the decision of a jury.

if the question be only as to the proper quantity of land to be cropped; and there has been no special contract on the subject, that is more fit for the decision of a jury (*k*).

In one case, an injunction to restrain a tenant from doing waste was refused, because the landlord had not previously brought an ejectment; but this course has not been followed.

In one case, a motion for an injunction, on behalf of a landlord against his tenant, to stay waste, was refused, because the landlord had not previously brought an ejectment (*l*); this distinction, however, does not appear to have been made in any other instance; and it is obvious, that, if the interference of Equity were suspended till after a trial at Law, or default of the defendant at such trial, such tardy jurisdiction might, in numerous instances, be almost nugatory.

Tenant in tail, after possibility of issue extinct, is punishable for waste, by Law;

but may, in Equity, be restrained from commission of malicious waste;

As tenant in tail after possibility of issue extinct is, by the provisions of the law, punishable for waste; it would be an inconsequence to hold, that, he could be restrained from felling timber on the estate; or that he had not the property in the trees so cut (*m*): though, having only an estate, limited, by the result of events, to his own life, he may, of course, be restrained from committing malicious waste, to the fraudulent destruction of the inheritance.

(*i*) *Kimpton v. Eve*, 2 Ves. & Bea. 349.

(*k*) *Johnson v. Goldsmaine*, 3 Anstr. 750.

(*l*) *Lathropp v. Marsh*, 5 Ves. 261.

(*m*) *Williams v. Williams*, 12 East, 220.

inheritance (*n*). For, where a particular estate is given, expressly, *without impeachment of waste*; this clause is never judicially interpreted to allow the very destruction of the estate itself; but to excuse permissive waste (*o*): against the commission of which by tenant for life, *sans* impeachment, there is no instance (*p*). In one reported case (*q*), which may appear to be in contradiction to the universality of this last-mentioned rule; it will be found, on examination, that the tenant for life was expressly bound, by the devise under which he claimed, to keep in tenantable repair the buildings, which he had suffered to become dilapidated: it is to be presumed, therefore, this was the ground on which the injunction issued.

which is never intended to be allowed, even where a particular estate is given, expressly, without impeachment of waste:

if tenant for life be expressly bound to keep certain buildings in repair, this qualifies the gift to him for life *sans* impeachment.

A tenant for life, without impeachment of waste, is clearly not compellable to pursue such a course of management of the timber upon the estate, as a tenant in fee might think most advantageous; whatever trees are fit for the purpose of timber he may cut down; though they may be in a still improving state (*r*). And where it is necessary, for the growth of underwood, to cut timber growing amongst it, this cannot (in any case, it should seem), be considered waste (*s*). A tenant for life, however,

Tenant for life without impeachment of waste may cut down any trees fit for timber.

Timber impeding the growth of underwood may be cut:

but, tenant for life, though dis-

(*n*) *S. C.* 15 Ves. 427; *Abraham v. Bubb*, 2 Freem. 54; *Anonym.* 2 Freem. 278; *Aston v. Aston*, 1 Ves. Senr. 265.

(*o*) *Lord Bernard's case*, Prec. in Cha. 454.

(*p*) *Wood v. Gaynon*, Ambl. 396; *Marquis of Lansdowne v. Marchioness Dowager of Lans-*

downe, 1 Jac. & Walk. 523.

(*q*) *Caldwall v. Baylis*, 2 Meriv. 408.

(*r*) *Smythe v. Smythe*, 2 Swanst. 252.

(*s*) *Knight v. Duplessis*, 2 Ves. Senr. 362; *Burgess v. Lamb*, 16 Ves. 179.

punishable for waste, must not cut down trees planted for ornament; or saplings.

Whether timber threatened to be felled is ornamental, can only be determined by an inquiry, whether it was planted with a view to ornament:

A wood will not be protected, because a house has been built near it:

for it is not enough, that, trees are, *de facto*, ornamental; they must be described, by *affidavit*, as planted and growing for ornament.

A termor may obtain an injunction to stay waste,

ever, though dispunishable for waste, must not cut down trees planted for ornament, or shelter to the mansion-house; or saplings not fit to be felled as timber (*t*); for this would not be a fairly beneficial exercise of the licence given to him; but a malicious and fraudulent injury to the remainder-man.

The question whether the timber threatened to be felled is, or is not, ornamental, being a vague question of taste; Courts of Equity have held, that, the only way of resolving it is, to inquire whether the trees were planted with a view to ornament by the testator, or other donor of the disputed interest; and to hold his taste conclusive (*u*). The doctrine as to ornamental timber, will not be carried to the extent of holding, that, by building a house near a considerable wood, the wood is entitled to the protection of Equity, under that principle; so that no part of the wood is to come down. It must not be understood that, all trees which, *de facto*, are ornamental, will be protected: to make the equitable doctrine applicable, the timber must be described, by *affidavit*, not as ornamental merely, but as planted and growing for ornament (*w*).

A termor who has built upon land which he holds at ground rent, is, upon a proper case shewn, as much entitled to an injunction to stay waste against his under-lessee, as if he had an estate of

(*t*) *Chamberlayne v. Dummer*, 3 Br. 549; *Lord Tarnworth, v. Lord Ferrers*, 6 Ves. 420.

(*u*) *Marquis of Downshire v.*

Lady Sandys, 6 Ves. 110; *Day v. Merry*, 16 Ves. 376.

(*w*) *Burgess v. Lambe*, 16 Ves. 183; *Williams v. M'Namara*, 8 Ves. 70.

of inheritance (*x*). And if a mortgagee in fee, in possession, commit waste by cutting down timber; without applying the money arising by the sale of such timber in reduction of the mortgage debt; a Court of Equity, on a bill brought by the mortgagor to stay waste, and a proper *affidavit*, will grant an injunction (*y*). On the other hand, where the mortgagor is allowed to continue in possession, if he commit waste, by cutting down timber, or otherwise; he will, at the suit of the mortgagee, be restrained from prejudicing the security. An injunction, in such case, will be more especially necessary to prevent fraud, if it be sworn, that, the land, without the timber, is a scanty security for the debt (*z*).

as, in certain cases, a mortgagor may against a mortgagee in possession.

On the other hand, a mortgagor, allowed to retain possession, may be restrained, at the suit of the mortgagee, from cutting timber.

Though a rector may cut down timber for the repairs of the parsonage house, or the chancel (*a*); yet, if he commit waste on the glebe, for other purposes, he may be restrained, by injunction, at the suit of the patron (*b*): and so may a Dean and Chapter, or a Bishop, at the instance of the Attorney General, on behalf of the Crown; in which the patronage of all bishopricks is vested (*c*). And as a rector, whilst he is incumbent, and has a fee simple, qualified by restrictions, may be restrained from committing waste upon his parsonage

A rector may cut down timber for repairs of the parsonage, or chancel; but, not for other purposes: waste by a Dean and Chapter, or a Bishop, may be restrained.

- (*x*) *Farrant v. Lovell*, 3 Atk. 723. ter on "Mortgages."
 (*y*) *S. C.* p. 724. (*a*) *Knight v. Mosely*, Ambl. 176; *Strachy v. Francis*, 2 Atk. 217.
 (*z*) *S. C.* and *Robinson v. Litton*, 3 Atk. 210; *Usborne v. Usborne*, 1 Dick. 76; *Humphreys v. Harrison*, 1 Jac. & Walk. 581. See, *post*, the chap-
 (*b*) *S. C.*
 (*c*) *Wither v. Dean of Winchester*, 3 Meriv. 427.

The widow of a rector may be restrained, during the vacancy of the living, if she attempt to commit waste: *a fortiori*, that, if, after his death, his widow, during the vacancy of the living, attempt to commit waste, she may be restrained, at the suit of the patron (*d*).

So, if a jointress, or tenant by the courtesy, or guardian, commit waste, an injunction may be obtained: against a tenant in dower, prohibition always lay at common Law.

So, if a jointress commit waste upon the jointure estate (*e*); or a tenant by the courtesy upon lands which he holds as such (*f*); or a guardian upon the estate of his ward (*g*); in each of these cases, an injunction may be obtained: And against a tenant in dower, a prohibition lay at common Law, before the statutes of Marlebridge and of Gloucester (*h*).

A tenant for life, subject to impeachment of waste, must not open new mines; but he may sink new shafts.

A tenant for life, subject to impeachment of waste, must not open new mines (*i*); for these belong to the inheritance: but he may, in the ordinary course of working them, take the produce of mines previously opened: and sink new pits, or shafts, for the purpose of working the old veins (*k*).

(*d*) *Hoskins v. Featherstone*, 2 Br. 552.

(*e*) *Aston v. Aston*, 1 Ves. Senr. 267.

(*f*) *Roberts v. Roberts*, Hardr. 96.

(*g*) *Clarke v. Thorp*, 2 Ves. Sen. 232.

(*h*) Co. Litt. 53, a; *Clavering v. Clavering*, Mosely, 220.

(*i*) *Whitefield v. Bewit*, 2 P. Wms, 242; *Tracy v. Hereford*, 2 Br. 138.

(*k*) *Clavering v. Clavering*, Mosely, 223.

CHAPTER VIII.

Fraud in the Confusion of Boundaries.

THE jurisdiction of Chancery in adjusting controverted boundaries, seems to have been modelled upon either the writ *de rationabilibus divisis*, or the writ *de perambulatione faciendâ* (a); though Lord Northington and Lord Thurlow were of opinion, that, consent was the ground on which it had been, at first, *exercised* (b).

The jurisdiction of Chancery in adjusting controverted boundaries,

Both these Judges concurred in holding, that, the Court of Chancery has simply no jurisdiction to settle boundaries of legal estate; unless some Equity is superinduced by the act of the parties: that is to say, unless some particular circumstance of fraud, or mistake, be shewn—as, where one party has ploughed too near the other, or the like (c). The Court of Exchequer (d), and Sir William Grant, M. R. (e), came to a similar conclusion, that, the confusion of boundaries furnishes, *per se*, no ground for the interposition of a Court of Equity, by granting a commission, or directing an issue.

does not arise unless some equity is superinduced by act of the parties;

confusion of boundaries furnishes, of itself, no ground for the interposition of Equity:

Lord

(a) Reg. Brev. 157, b.

(d) *Atkyns v. Hatton*, 2

(b) *St. Luke's v. St. Leonard's*, Anstr. 386.

1 Br. 40.

(e) *Speer v. Crawler*, 2 Mer.

(c) *Wake v. Conyers*, 2 Cox, 417.

362; S. C. 1 Eden, 331.

it is otherwise when the confusion arises from the neglect of the tenant whose duty it was to keep up the boundaries;

or when there has been an agreement to have the lands distinguished; or the muniments are in the defendant's hands.

The case of *The Duke of Leeds v. Powell*, analysed.

Lord Rosslyn's decree in the case of *The Duke of Leeds v. The Earl of Strafford* (*f*); and the cases of *Norris v. Le Neve* (*g*), and *The Duke of Leeds v. Powell* (*h*), heard before Lord Hardwicke, are not inconsistent with the decisions first referred to. In *The Duke of Leeds v. The Earl of Strafford*, a commission was granted, not simply because the boundaries were confused, but because they had become so by the neglect or fraud of the tenant, whose duty it was to keep them up (*i*); which clearly brought the case within the jurisdiction of Equity: and it was upon this principle, that, the case of *The Attorney General v. Fullarton* (*k*), was decided. In the case of *Norris v. Le Neve* it did not, indeed, appear, that it was by default of the defendant, that, the boundaries were confused; but we learn, from the early part of the report (*l*), there was an agreement between the parties, that, the lands should be distinguished; and also, that, many of the writings belonging to the estate, which probably were necessary to enable the plaintiff to ascertain his right, were in the defendant's hands: either of which facts may sufficiently account for the commission being granted. In *The Duke of Leeds v. Powell*, Lord Hardwicke said, that, "as Equity will relieve where there is a clear right to rent, but no remedy at Law, as no *demesne* lands on which to distrain; so it will where there can be no distress owing to a confusion

(*f*) 4 Ves. 180.

(*g*) 3 Atk. 31, 82.

(*h*) 1 Ves. Sen. 171.

(*i*) *Willis v. Parkinson*, 1

Swanst. 9; *Speer v. Crawler*, 17 Ves. 225.

(*k*) 2 Ves. & Bea. 264.

(*l*) In 3 Atk. 31.

a confusion of boundaries, &c.” As this observation, respecting boundaries, was merely incidental, and only illustrative of the principal case then under consideration, perhaps the comprehensive “&c.” may fairly be understood as including those circumstances of fraud, or neglect, which would bring any such case within equitable jurisdiction: but it is further to be observed, that, there was, in this case, no question as to granting a commission, or issue, to ascertain boundaries simply, (“that jurisdiction which Courts of Equity have always been very cautious in exercising (*m*),”) but the relief was in aid of a distress; as it was in the cases of *The Duke of Bridgwater v. Edwards* (*n*), and in *Eton College v. Beauchamp* (*o*); which last cited case, with that of *The Duke of Leeds v. Powell*, it may be incidentally remarked, have settled, that, although at Law the land, only, be chargeable with fee farm, or quit rents; yet, in Equity, where the land has been holden without due payment, the tenant’s personal estate, whether in his own hands or those of his representatives, is answerable for the arrears, to the amount of the profits derived by him from the premises.

Courts of Equity cautious in granting a commission, or issue, to ascertain boundaries simply; but will give this relief in aid of a distress:

As there can be no distress upon tithes, relief may be had in Equity, in case of non-payment of rent issuing out of a portion of tithes (*p*). Whenever a proper case is shewn for granting a commission, and it is impossible, from the default of the tenant, to distinguish the exact boundaries; a

or where there can be no distress, Equity will decree the full estimated value to the proprietor in certain cases.

Court

(*m*) *Atkins v. Hatton*, 2 Anstr. 395.

(*n*) 4 Br. P. C. 139.

(*o*) 1 Cha. Ca. 121.

(*p*) *Berkeley v. Lord Salisbury*, cited in 2 Br. 518.

Court of Equity will inquire what was the value of the estate, (valued fairly, but to the utmost as against that tenant), and assign the proprietor a full equivalent (*q*).

A commission does not issue to distinguish boundaries of a manor:

or parish.

A commission to distinguish the boundaries of a manor ought not, it seems, to be granted; for manors do not, properly, consist of metes and bounds; and a certificate from commissioners on this subject will be quashed (*r*). The like rule holds as to the boundaries of parishes (*s*).

When it does not appear how the confusion of boundaries has arisen, the expense of a commission must be borne equally by both parties, though their interests be unequal.

With respect to the expense of commissions of this nature, Lord Hardwicke settled, that, it should be borne equally by both parties, though their interests be unequal; for the confusion may, possibly, nay even probably, have arisen from the estate of least value; and if it were determined, that, the expense should be borne in proportion to the *quantum* of interest, an account must be directed before the Master, which would be more chargeable to all parties (*t*). This rule was most just in the case before his Lordship—where it did not appear how the confusion had arisen: but it would be inapplicable to a case in which it appeared, that, the necessity for the commission had arisen solely from the fraud, or default, of one of the parties.

The

(*q*) *Duke of Leeds v. Lord Strafford*, 4 Ves. 186; *Aston v. Lord Exeter*, 6 Ves. 293; *Attorney General v. Fullarton*, 2 Ves. & Bea. 265.

(*r*) *Norris v. Le Neve*, 3 Atk. 82: the question is properly triable at Law. See *Lethieul-*

lier v. Lord Castlemain, 1 Dick. 47.

(*s*) *Atkins v. Hatton*, 2 Anstr. 395; *St. Luke's v. St. Leonard's*, 1 Br. 40.

(*t*) *Norris v. Le Neve*, *ubi supra*.

The foundation of a commission to ascertain boundaries, when both parties do not consent, must be laid by shewing, not merely that confusion has arisen, but, that, it has arisen from misconduct on the part of the defendant, or those under whom he claims, rendering it incumbent on him to co-operate in re-establishing them (*u*). For, a Court of Equity will not interfere between two independent proprietors, and force one of them, against whom no fraud, or default, is established, to have his rights tried and determined in any other than the ordinary legal mode, in which questions of property are to be decided (*w*).

A commission cannot be had, if one party, to whom no blame attaches, resist it.

When the commissioners have returned their certificate, the practice of the Court of Chancery is, for the plaintiffs to obtain an order *nisi* for confirming the certificate: but in the Court of Exchequer the course is, upon the return of the certificate, to set the cause down for further directions; and as, in this way, the opposite party has notice, the return may be confirmed absolutely in the first instance (*x*).

Practice, as to confirming the commissioners' certificate, in Chancery; and in the Exchequer.

(*u*) *Miller v. Warmington*, 417.

1 Jac. & Walk. 492.

(*w*) *Speer v. Cranter*, 2 Mer.

(*x*) *Dean & Chapter of Here-*

ford v. Hullet, 6 Price, 332.

CHAPTER IX.

Fraud in matters of Partition.

Courts of Equity have no *original* jurisdiction in partition;

but, issue commissions for this purpose, on account of the difficulty attending partition at Law:

Upon a bill for partition, the Court directs an inquiry to ascertain who are entitled to the whole subject of partition.

THE Court of Chancery has no original jurisdiction in partition; which is a proceeding at common Law (*a*): a party choosing to have a partition has the Law open to him; there is no Equity for it (*b*). The Courts of Chancery and Exchequer issue commissions, for this purpose, not under the authority of any Act of Parliament; but on account of the extreme difficulty attending the process of partition at Law; where the plaintiff must prove his title as he *declares*, and also the titles of the defendants. That is attended with so much difficulty, that, by analogy to the jurisdiction of a Court of Equity in the case of dower, a partition may be obtained by bill. The plaintiff must, however, state upon the record his own title, and the titles of the defendants; and the Court will direct an inquiry, to ascertain who are, together with him, entitled to the whole subject of partition (*c*). It is evident, that, where the interest is much divided, this course is much more convenient than proceeding

(*a*) *Mundy v. Mundy*, 2 Ves. Ves. Jun. 570.
Jun. 124.

(*b*) *Calmady v. Calmady*, 2 Ves. 553.

(*c*) *Agar v. Fairfax*, 17

ceeding in a Court of Law (*d*). And the jurisdiction is now so established by usage, that, a commission is considered due, in all cases where the writ would lie (*e*): and not only so, but, it has been declared, there is no doubt, that, a Court of Equity may interfere in cases where a writ of partition would not lie at common Law (*f*).

By usage, a commission is held due, wherever the writ would lie:

and, in some cases, where it would not.

The forms of completing a partition at Law and in Equity are essentially different. In the first case, it is effected by the judgment of a Court of Law, and the delivering up possession in pursuance thereof; which concludes all the parties to the judgment. Partition in Equity proceeds upon conveyances to be executed by the parties; and the partition cannot be effectually had, if the parties be not competent to execute the conveyances (*g*): and, for this reason, it is essential to have the legal title before the Court (*h*): And though an infant may be either plaintiff or defendant under a bill for partition, yet, the conveyances of all parties must be respited till he comes of age (*i*).

At Law, partition is effected by judgment of the Court, which concludes all the parties to the judgment:

In Equity, partition proceeds upon conveyances to be executed by the parties.

And if an infant be a party, the conveyances of all parties must be respited.

Another marked distinction is, that, under a writ for a partition, that specific relief alone can be had; but, under a commission the account between the parties, with respect to the rents and profits of the estate, may be decreed at the same time (*k*).

Under a writ, partition alone can be had; under a commission an account may be decreed.

Commissioners

(*d*) *Baring v. Nash*, 1 Ves. & Bea. 555.

v. Lord & Lady Hertford, 2 P. Wms. 518.

(*e*) *Turner v. Morgan*, 8 Ves. 145; *Manaton v. Squire*, 2 Freem. 26.

(*h*) *Miller v. Warmington*, 1 Jac. & Walk. 498.

(*f*) *Swan v. Swan*, 8 Price, 519.

(*i*) *Tuckfield v. Buller*, 1 Dick. 243.

(*g*) *Whaley v. Danson*, 2 Sch. & Lef. 372; *Lord Brook*

(*k*) *Lorimer v. Lorimer*, 5 Ves. 363.

Commissioners, appointed to settle a partition, owe an impartial duty to the Court.

Commissioners, appointed to settle a partition, violate their duty, and the confidence reposed in them by the Court, if they consider themselves either the plaintiff's or defendant's commissioners; they owe an impartial duty to the Court, and all the parties equally (*l*).

Partition is usually between joint-tenants, tenants in common, or co-parceners; but tenants in dower not excluded.

It has been said, *obiter*, that, partition can only be between joint-tenants, tenants in common, or co-parceners (*m*): but, under some circumstances, the jurisdiction has, for a length of time, been admitted in bills for dower (*n*); the resemblance being close between the titles of tenant in common and in dower.

Equity will not permit a demurrer to a bill for partition, on the ground of the inconvenience of a temporary partition;

And joint-tenants, or tenants in common, who have only a particular estate for term of life, or years, are, by statute (*o*), compellable to make partition by writ: a Court of Equity, therefore, will not, merely in consideration of the inconvenience of a temporary partition, permit a demurrer to a bill, by a plaintiff having a quantity of interest which would entitle him to the writ (*p*); although the owner of the inheritance does not choose, and cannot at the instance of a termor be compelled, to join in the object of the suit.

though the owner of the inheritance will not join in the object of the suit;

or because parties may subsequently come in *esse*, who will be entitled;

Upon the same reasoning, it is no objection to a partition, that parties may subsequently come in *esse*, who will be entitled; in which event the whole process will have to be commenced over again.

(*l*) *Watson v. Duke of Northumberland*, 11 Ves. 160.

Jun. 129.

(*m*) *Miller v. Warmington*, *ubi supra*.

(*o*) Stat. 32 Hen. 8, c. 32.

(*p*) *Baring v. Nash*, 1 Ven. & Bea. 555.

(*n*) *Mundy v. Mundy*, 2 Ves.

again (*q*). And difficulty, or inconvenience, or minuteness of a party's interest, cannot, in any case, avail as an objection to a commission (*r*). or on the score of difficulty; or the minuteness of a party's interest.

A mortgagee of an undivided estate cannot be compelled to agree to a partition, for he is entitled to the whole: but neither is he a necessary party to a partition as between the mortgagors; and the parties jointly interested in the equity of redemption may have a partition, without bringing the mortgagee before the Court. When, however, one of the joint-tenants of the equity of redemption has been in possession of the estate as occupier, and has been at great expense in improvements, although such expenditure may not, strictly speaking, give a *lien* on the premises, yet, if the other joint-tenant refuse to make a reasonable allowance and satisfaction for the advantage arising to the estate from these improvements, this will be good ground for a Court of Equity to decline granting a commission for a partition, at the suit of the party who has refused such reasonable terms (*s*). A mortgagee is not a necessary party to a partition: but joint-tenants of the equity of redemption may have a partition as between themselves.

A bill will lie for a partition of tithes (*t*); or of an advowson, which may be necessary when a party jointly interested, whether from fraudulent or perverse motives, will not concur in a presentation, thereby endangering a lapse to the bishop of the diocese (*u*): in such cases, there will be a decree A bill lies for partition of tithes; or of an advowson:

- (*q*) *Wills v. Slade*, 6 Ves. 498. *Baynes*, Ambl. 589.
 (*r*) *Parker v. Gerrard*, Ambl. 236; *Baring v. Nash*, 1 Ves. & Bea. 544; *Turner v. Morgan*, 8 Ves. 145: and see 11 Ves. 157, in note; *Warner v.*
 (*s*) *Swan v. Swan*, 8 Price, 519.
 (*t*) *Baxter v. Knollys*, 1 Ves. Senr. 495.
 (*u*) *Matthews v. Bishop of Bath & Wells*, 2 Dick. 652.

form of a decree in a suit of the latter description.

for mutual conveyances, so that the plaintiff may hold one moiety of the advowson to him and his heirs; and the defendant the other moiety to him and his heirs, as tenants thereof in severalty respectively; with a clause, that each shall present alternately: and if it appear, that, the last presentation was made by one party alone, or by those under whom he claims; then, on the next ensuing avoidance, the other party will have that turn of presentation allotted to him (*w*).

As general doctrine, a partition is not a good execution of a power to sell or exchange;

It was, in one case, held, that, a partition was a good execution of a power to sell or exchange (*x*); but if that decision cannot be distinguished by, and made to rest upon, its own special circumstances, it seems over-ruled, as general doctrine, by later cases; in which it is laid down, that, a partition and an exchange are perfectly distinct modes of assurance; each having its own rules, which are inapplicable to the other. On a partition, each party has his own land, though he acquires a different interest in it; but, on an exchange, the land is parted with altogether, and new lands acquired: the transactions may approximate to each other and have some things in common, but they are not the same (*y*).

the modes of assurance being clearly distinct:

on a partition, each party has his own land; by an exchange, new lands are acquired.

Mere partition does not revoke a previous devise:

but the slightest addition to the purpose of partition does.

A mere partition of an estate, whether effected by compulsion or agreement, does not operate a revocation of a previous devise of that estate: but the slightest addition to that purpose, will be a revocation

(*w*) *Bodicoate v. Steers*, 1 Dick. 69.

(*x*) *Abel v. Heathcote*, 2 Ves. Jun. 101.

(*y*) *Attorney General v. Hamilton*, 1 Mad. 223; *M'Queen v. Farquhar*, 11 Ves. 476.

revocation of the will: if nothing more be done (in addition to the partition) than the introduction of a power of appointment, prior to the limitation of uses, that very slight circumstance is sufficient to revoke the will (x). And an agreement for a partition which cannot be performed *in ipsissimis verbis*, but is yet such an agreement as Equity will execute, *giving a compensation*; is a revocation of a previous will (a).

An agreement for a partition may revoke a will.

When one tenant in common has granted a lease of his share in the estate; to a bill for partition, the lessee is a necessary party; and his costs must be borne by his lessor (b). The existence of a lease, however, may, in some instances, throw insuperable difficulty in the way of a partition: if, indeed, the lease be of an undivided moiety of the lands; then, being taken subject to the right of partition, a Court of Equity might order the part allotted to the lessor to be subject to the lease, and liberate the other part: but, where there has been a parol partition of an estate between the parties entitled; and a lease has been granted by one of them, of the part allotted to him; *he* cannot, during the existence of that lease, whereby the value of the whole estate may perhaps be injured, insist upon a new, and formal, partition. If, in such case, a partition were awarded, the estate must be valued free from the lease; but, the lessee could not be directed to join in the conveyance; for he would be entitled to insist, that, no part of the land

When an undivided share of an estate is in lease, the lessee is a necessary party to a bill for partition; and the existence of a lease, may, under peculiar circumstances, be an insurmountable objection to a partition.

(x) *Knollys v. Alcock*, 5 Ves. 654: confirmed, on appeal, 7 Ves. 564..

(a) *S. C.* 7 Ves. 565.

(b) *Cornish v. Gest*, 2 Cox,

land comprised in his lease should be conveyed away from his lessor (c).

A partition by parol agreement not to be disturbed, after a length of time.

Though an agreement for a partition was entered into by parol only, yet, after it has been actually executed, and the enjoyment in severalty has, for a length of time, gone in conformity thereto, the Court of Chancery will not allow such an agreement, so acted upon, to be disturbed; provided the parties agreeing were competent to bind the inheritance (d).

Rule as to costs on a bill of partition.

The expenses of a commission are to be borne by the parties in proportion to their respective interests (e); but with this understanding, that, under a bill for partition, no costs are given up to the hearing (f): for there would be no equity in saddling one party with any portion of the charges in respect of previous collateral questions raised by the other (g).

A partition never affects the interests of persons not parties thereto:

duty of commissioners, and payment of their charges.

A partition, and, *a fortiori*, an agreement for a partition, never affects the interests of persons not parties thereto (h); what the proportions and rights of the actual parties may be, it is the province of the Court to ascertain; and, when that is done, then the duty of the commissioners begins; which is, to make a division in those ascertained proportions (i). The commissioners, having undertaken this duty, cannot insist upon payment of their charges,

(c) *Whaley v. Dawson*, 2 & Bea. 554.
Sch. & Lef. 372.

(d) *Ireland v. Rittle*, 1 Atk. 542.
Sch. & Lef. 371.

(e) *Calmady v. Calmady*, 2 542.
Ves. Jun. 570.

(f) *Baring v. Nash*, 1 Ves. 543.

(g) *Whaley v. Dawson*, 2

Sch. & Lef. 371.

(h) *Ireland v. Rittle*, 1 Atk.

(i) *Agar v. Fairfax*, 17 Ves.

charges, before they make their return. It is not competent to an officer of a Court of Equity to stop in any stage of his duty, and refuse to proceed: he must go on and complete it; and then come to the Court for remuneration (*k*). If under a commission for partition, directed to four commissioners, two different returns are made, and each of them by two commissioners; this is not a due execution of the authority on either side: the Court will act upon neither, but issue a new commission to five commissioners (*l*).

If two different returns are made, the Court will act upon neither, but direct a new commission.

(*k*) *Young v. Sutton*, 2 Ves. 366. *umberland*, 11 Ves. 162; *Corbet v. Davenant*, 2 Br. 252.

(*l*) *Watson v. Duke of North-*

CHAPTER X.

Fraud in respect of Testamentary Dispositions of Property: or claims arising out of Intestacy.

The direct jurisdiction of Chancery to relieve against fraud, restricted in the instance of wills:

WE have already had occasion to state (*a*), that, the principle of peculiar jurisdiction, which gives to the Court of Chancery more extensive privileges and powers to relieve against fraud than to any other Court, is subject to one exception; which belongs to the subject we are now about to enter upon.

If the execution of a will relating to personal property be obtained by fraud, or if it be fraudulently set up, such will can only be set aside by the Ecclesiastical Courts (*b*); if it relate to real estate, a Court of Equity can do no more, in the first instance, than direct an issue, *devisavit vel non*, to a Court of common Law (*c*). A Judge in Equity cannot even notice any alleged variance between a will as it stands, and the instructions given for preparing it (*d*). But, in order to enable an heir to try the validity of his ancestor's will by the convenient

(*a*) See the introductory chapter, p. 17. 824; *Pemberton v. Pemberton*, 13 Ves. 297; *Jones v. Jones*, 3

(*b*) *Archer v. Moss*, 2 Vern. Meriv. 171.

8; *Ex parte Fearon*, 5 Ves. 647. (*d*) *Murray v. Jones*, 2 Ves.

(*c*) *Bennett v. Wade*, 2 Atk. & Bea. 318.

convenient mode of an action of ejectment, a Court of Equity will remove out of his way all obstacles arising from outstanding terms, satisfied or unsatisfied (e).

It must not, from what has been said above, be inferred, that, with respect to frauds connected with wills, the arm of the Court of Chancery is paralysed. On the contrary, there is no branch of its jurisdiction which is more frequently, or more efficiently, exercised, than the correction of fraud attempted through the medium, or in defeat, of testamentary dispositions.

but, the collateral jurisdiction of Equity with regard to testamentary dispositions is most extensive.

It is to be observed, that, suppression of instruments affecting title may, in many cases, give to Courts of Equity a jurisdiction which they had not originally over the subject (f). Thus, although the rule is, not to allow a suit against an executor for a legacy before probate of the will; yet, if the executor have fraudulently destroyed the will, this spoliation and destruction will entitle the plaintiff to apply to the Court of Chancery, in the first instance, for a decree; and he will not be driven to cite the executor into the Ecclesiastical Court, where, the forms of proceeding, in proof of the suppressed will, are attended with much greater difficulty (g). For, although the Spiritual Court is the proper *forum* for deciding whether an instrument is to be considered as testamentary, or not; yet, other Courts must, sometimes, be under the necessity of determining that question, when it forms

The suppression of testamentary instruments may give Courts of Equity an original jurisdiction over such subjects;

and they may be driven to decide whether an instrument is testamentary.

(e) *Pemberton v. Pemberton*, Hob. 109.
13 Ves. 298.

(g) *Tucker v. Phipps*, 3 Atk.

(f) *Lord Hunsdon's case*, 360.

forms an essential ingredient in a case brought before them, and the parties will not resort to the Spiritual Court (*h*).

Complete effect to be given to a testator's intent, when not illegal:

The leading principle, by which Courts of Equity are guided in their decisions upon wills, is, that, complete effect ought to be given to the true intention of testators (*i*), so far as that intention is not repugnant to Law (*k*). To prescribe any determinate *formula* of words for the expression of every testator's intent, would (from the infinite variety of situations and circumstances,) be, obviously, impracticable. All Courts, therefore, are necessarily driven, in many instances, to give operation to a will by means of inference and construction:

in explanation of which, inference and construction are often necessary.

But the plain sense of words must not be tampered with, for the sake of a more convenient construction.

and, where a will is obscure, a Court may be obliged to be contented with slight circumstances for its explanation (*l*). But, the best rule of construction is that which takes the words of a will to comprehend all that, and no more than, falls within their usual sense; unless there be something like declaration plain to the contrary, in other parts of the instrument (*m*). Where the meaning can be ascertained, and is not illegal, no arguments *ab inconvenienti* can induce a Court to put a different construction on a testator's words (*n*). And a difficulty as to carrying into execution a particular

(*h*) *Attorney General v. Jones*, 3 Price, 379.

(*i*) *Thelluson v. Woodford*, 11 Ves. 148.

(*k*) *S. C.* in an earlier stage, 4 Ves. 329; *Dodson v. Grew*, Wilmot, 274.

(*l*) *Sansbury v. Read*, 12 Ves. 77.

(*m*) *Church v. Mundy*, 15 Ves. 406.

(*n*) *Leigh v. Leigh*, 15 Ves. 103.

ticular direction, even although such difficulty should amount to positive impracticability, will not authorize a Court to substitute another form of disposition, controlling the express words of the testator's declaration.

In order to develop the application of these principles, and of others equally connected with the present branch of this Treatise, it may be necessary to take a very compendious review of the rise and origin of testamentary powers; as well as of the limits within which those powers are, either prescriptively or by positive enactment (*p*), confined.

Compendious view of the rise and progress of testamentary powers, in this country.

So long as the feudal system continued in full activity in this kingdom, although the disposal of personalty by will was, partially, and to a certain extent, admitted (*q*); yet, the alienation of land, to which personal duties and services were annexed as a condition of tenure, was, as a necessary consequence, prohibited, even during the lifetime of the tenant; unless the consent of his lord, (and of his own heir, where the lands were held by descent,) was first obtained (*r*). Of course, any disposal of the lands by the tenant, to take effect after his death, was still more inadmissible.

Under the feudal system, this right of disposition was, at first, restrained to part of a testator's personalty.

As the interest of the lord, in the personal qualities of his vassal, was very great, where the tenure

Alienation of land held by military tenure, was

(*o*) *Deffis v. Goldschmidt*, 1 Meriv. 420; *Bernard v. Montague*, 1 Meriv. 431.

(*p*) *Dodson v. Grew*, Wilmot, 174; *Keiley v. Fowler*, Wilm. 807.

(*q*) 2 Black. Comm. 491, citing Glanvil. lib. 2, c. 5; Bracton, l. 2, c. 26; Fleta, l. 2, c. 57.

(*r*) Dalrymple's Hist. of feudal property in Great Britain, chap. 3, sect. 1.

more objectionable than when the land was held in socage.

By *Magna Charta*, every man's right to dispose of part of his land, was recognized.

This led to sub-infeudations; a practice restrained by the statute *quia emptores*;

which was, by the contrivance of uses, made to answer testamentary purposes: and though a subsequent statute converted an use so raised into the legal estate; this was defeated by the invention of trusts.

ure was military; but these qualities were of comparatively trifling importance, where the lands were held by socage, or burgage, tenure; it was with respect to lands of these latter descriptions, that, the power of alienation first was allowed.

At the time when *Magna Charta* was enacted, the right of every freeman to *give* or sell a part of his land, so that the residue should be sufficient to answer the services due to the lord, was recognized (*s*). This power having led to the frequent practice of sub-infeudation, which operated as a fraud upon the rights of the lords paramount, the evil was redressed by the statute "*Quia Emptores*," which determined, that, purchasers should hold of the chief lord, and not of the feoffor; and, that, where the tenant sold part of the lands, the services should be apportioned (*t*). Under this statute the power of alienation to take effect after death, whilst the party retained the *utile dominium* for life, was, virtually, but circuitously, made feasible, by means of raising an use. The statute of 27 Hen. 8, c. 10, by converting an use so raised into the legal estate, interrupted this contrivance. But, ingenuity being stimulated by strong motives both of private and public convenience, another device was speedily found out; and by the simple process, (as a learned Judge has described it,) of adding three words to the conveyance, and thereby raising a second use, the transaction was decided to be taken out of the operation of the act; and a *trust* to be raised, which a Court of Equity would

(*s*) Stat. 9 Hen. 3, chap. 30.

(*t*) Stat. 18 Edw. 1, c. 1, 2.

would execute (*u*). The necessity, however, for having recourse to these circuitous modes of directing the devolution of lands after the decease of the actual tenant, was, to a great extent, obviated, soon after, by what are usually described as the statutes of wills (*v*); by these acts, all persons were expressly enabled to dispose, by will, of all lands holden by them in common socage, and not by knight's service. Finally, the statute of the 12 Car. 2, c. 24, took away and discharged all tenures by knight's service, of whomsoever the same were holden, and also all tenures by socage *in capite*, together with the fruits and consequences thereof: and further enacted, that, all tenures thereafter to be created should be in free and common socage only.

These circuitous modes were, to a great extent, rendered unnecessary by the statutes of wills;

and, by the abolition of military tenures, and their consequences, all lands holden in fee simple became devisable.

By this act, coupled with the statutes, before cited, of Hen. 8, all, or nearly all, the lands in this kingdom became devisable by those who were owners thereof in fee simple. Copyholds, however, could not, till a very late period, be bequeathed, without the ceremony of a previous surrender to the use of the will; and then passed, not by virtue of the will, as such, but, as a declaration of the use: but, a modern statute (*w*) has made dispositions of copyhold estates by will effectual, although no previous surrender to the uses thereof may have been made. The act provides, that, this indulgence shall not operate in fraud of the lord of the

But copyholds could not be bequeathed without a previous surrender, until a recent statute obviated the necessity of this, as far as it was mere matter of form.

(*u*) *Hopkins v. Hopkins*, 1 Atk. 591; *Burgess v. Wheate*, 1 W. Bla. 160, 180; *S. C.* 1 Eden, 223, 247.

(*v*) Stat. 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5.

(*w*) Stat 55 Geo. 3, c. 192.

This statute does not supply the defect of a surrender by a *feme coverte*.

the manor, or of the Crown; but, that, the devisee shall only be admitted on payment of all such stamp duties, fees, and sums of money, as would have been payable upon a surrender to the use of the will. This act, it should be recollected, does not supply the defect of a surrender by a *feme coverte*, where, by the custom of the manor, such surrender is necessary to substantiate her will; for, in such cases, a separate examination of the *feme coverte* is essential to a free disposal of the property by her: and the statute in question was intended to supply mere matter of form only (*x*). Neither will copyhold pass under a general devise, where the testator has left any freehold property; and has not, by his will, described any part of his estate as being copyhold (*y*).

Estates *pur autre vie*.

Estates of occupancy, held *pur autre vie*, were considered as not within the purview of the statutes of wills; but clearly came within the scope of the statute against fraudulent devises (*z*). That they were also within the 12th section of the statute for prevention of frauds and perjuries, to the extent of being assets for payment of debts, was never doubted. But, how, in a case of intestacy, the surplus should be applied, was made a question: to resolve this, it was enacted (*a*), that, where there is no special occupant of an estate *pur autre vie*, of which no devise has been made according

In cases of intestacy, such estates distributed as personalty:

(*x*) *Doe v. Bartle*, 5 Barn & Ald. 507; *S. C.* 1 Dowl. & Ryl. 91.

(*y*) *Hodgson v. Merest*, 9 Price, 574, 575.

(*z*) Stat. 3 Will. & Mary, cap. 14.

(*a*) Stat. 14 Geo. 2, cap. 20, sec. 9.

ing to the statute of frauds, such estate, or so much thereof as shall not have been so devised, shall be distributed as the *personal* estate of the testator, or intestate. But, though such estates are, with reference to creditors and personal representatives, treated as personalty; and, in a Court of Equity, the executor is deemed a trustee for those to whom the same is given, by a will sufficient to pass personal estate (*b*); still, it should seem, that, none but creditors and representatives can acquire the legal interest in such property, except by a conveyance applicable to *freehold* estate; for, that, to a certain extent, it answers that description, was never doubted (*c*).

but, generally, legal interest in such property, can only pass by a conveyance applicable to freehold estate.

The too extensive construction which at first was given to the statutes of wills, opened a wide door to frauds upon these final dispositions of property. Loose notes, in the handwriting of another, and not signed by the testator, were sustained, upon parol evidence, as a good and sufficient will, in disposal of lands (*d*). To remedy this evil, the 5th sect. of the statute of frauds and perjuries (*e*) enacts, that, all devises and bequests of *lands* shall be in writing, and signed (*f*) by the person devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of

How devises of land must be executed, and attested.

(*b*) *Ripley v. Waternorth*, 7 Ves. 452.

(*c*) *S. C.* *ibid.* p. 438.

(*d*) *Stephens v. Gerrard*, 2 Keble, 128; *S. C.* 1 Sid. 315.

(*e*) Stat. 29 Car. 2, c. 3.

(*f*) *Morison v. Turnour*, 18 Ves. 183; *Coles v. Trecothick*, 9 Ves. 248.

of the devisor, by at least three credible witnesses; or else such devise shall be utterly void.

What attestation is, at Law, necessary to bequests of stock; and in what manner Equity remedies the omission of such attestation.

With respect to bequests of stock in the public funds, it was only necessary by the old acts to devise by a will in writing (*g*): but, by later statutes (*h*), such devise (which is in the nature of a parliamentary appointment, and does not require the assent of the executor,) is inoperative at Law unless it be attested by two witnesses. In Equity, however, though the executor would take any stock disposed of without such attestation, he would take it as trustee for those entitled to the personal estate; and (by what may appear an artificial refinement to get rid of the statute of frauds,) it would be held, not that the stock was devised by the will, but, that the will was a direction to the executor how to apply it (*i*). And as to personal property of every other description, no guards against imposition are provided, by the necessity of an attestation (*j*); the loosest documents have been admitted to probate as testamentary dispositions of property, by the Ecclesiastical Courts; and, by the sentence of those Courts, the Court of Chancery is, in this case, bound (*k*). But, with this qualification, namely, that, although the judgment

Bequests of personalty of any other description need no attestation;

(*g*) *Pearson v. Bank of England*, 2 Cox, 179.

(*h*) Stat. 33 Geo. 3, c. 28, s. 14, and 35 Geo. 3.

(*i*) *Ripley v. Waterworth*, 7 Ves. 441, 452.

(*j*) *Doker v. Goff*, 2 Addams, 46.

(*k*) *Downing v. Townsend*, Ambl. 280, 595; *Lynn v. Beaver*, 1 Turn. & Russ. 67; *Druce v. Dennison*, 6 Ves. 397; *Beauchamp v. Earl of Warwick*, 5 Ves. 285; *Eden v. Smith*, 5 Ves. 354; *Cox v. Basset*, 3 Ves. 160.

ment of the Ecclesiastical Court is necessary, to declare such instrument to be in the nature of a will, yet, the Court of Chancery afterwards examines the circumstances of attestation, and signature, according to its own rules of evidence, where the testamentary paper is to operate as the execution of a power; and does not trust the Ecclesiastical Court with the conclusion, that, because the writing is testamentary, it must, in Equity, be deemed a good appointment (*l*). unless the disposition be made in execution of a power.

The execution of a will, disposing of real estate, is to be proved by the subscribing witnesses, if they are alive, and can be produced. On a trial at common Law, all the circumstances may be proved by a single witness; provided there were actually three witnesses, as the statute of frauds requires (*m*). But, though the devisee need not call more than one witness, the opposite party may call the other subscribing witnesses. Should one of the witnesses refuse to swear that he saw the testator publish his will, if that fact can be proved by other sufficient testimony, the fraud of the obstinate witness will not be suffered to defeat the testator's will (*n*). In the Court of Chancery it is the general rule, never to establish a will unless all the witnesses are examined; because the heir has a right to evidence of sanity from every one of those whom the statute has placed round his ancestor, as guards against fraud. This is not a mere How the execution of a will, devising real estate, is to be proved; at common Law, and in Chancery.

(*l*) *Rich v. Cockell*, 9 Ves. 376, 381.

(*n*) *Dayrell v. Glasscock*, Skinner, 413; *Pike v. Badmer-*

(*m*) *Anstey v. Dowsing*, 2 Str. 1254. *ing*, cited 2 Str. 1096.

mere technical rule. The design of the statute was to prevent wills which ought not to be made; and operates silently, but forcibly, by intestacy (*o*). But, though the general rule of the Court of Chancery be, that, all the subscribing witnesses must be examined (*p*); yet it would be laying down the rule too largely, to say, that, in no case can a will be proved in Equity without such complete examination (*q*): It was, long ago, held that, when the best endeavours have been used to discover, and bring forward, a witness; if these efforts are fruitless, the witness may be considered dead (*r*). It is with this qualification we must understand the rule, that, the proof of the death of an attesting witness must be positive (*s*). An exception to the general rule has been thought reasonable where one of the witnesses was in the West Indies (*t*): or otherwise not amenable to the jurisdiction of the Court (*u*). This last circumstance seems most important, for a witness may be abroad; and yet a commission may be sent out to examine him (*w*). But, in such a case, an account may be decreed in the meantime; even though the will cannot be formally

(*o*) *Hindson v. Kersey*, 4 Burn's Eccles. Law, 91; *Bootle v. Blundell*, 19 Ves. 500; *S. C. Cooper*, 138.

(*p*) *Townsend v. Ives*, 1 Wils. 216; *Ogle v. Cook*, 1 Ves. Senr. 177.

(*q*) *Powell v. Cleaver*, 2 Br. 503.

(*r*) *Anonym. Godbolt*, 326; *M'Kenire v. Fraser*, 9 Ves. 6.

(*s*) *Bishop v. Burton*, Comyn. 614: and see *Burrowes v. Lock*, 10 Ves. 474.

(*t*) *Lord Carrington v. Payne*, 5 Ves. 411; *Wood v. Stane*, 8 Price, 615.

(*u*) *Fry v. Wood*, 1 Atk. 445.

(*v*) *Fitzherbert v. Fitzherbert*, 4 Br. 430; *Grayson v. Atkinson*, 2 Ves. Senr. 460.

formally and finally proved (*x*). Of course, if one of the witnesses become insane he must be considered as if he were dead (*y*).

A person who signs his name as witness to a will, by this act of attestation solemnly testifies the sanity of the testator. Should such witness afterwards attempt to impeach his own act, and to prove that the testator did not know what he was doing when he made (what purported to be) his will; though such testimony will be far indeed from conclusive (*z*); and Lord Mansfield held, that, a witness impeaching his own act, instead of finding credit deserved the pillory (*a*), yet, Lord Eldon has not gone so far in exclusion of such evidence; admitting, however, that it is to be received with the most scrupulous jealousy (*b*). Sir John Nicholl has, perhaps, laid down the most distinct rule; namely, that, such testimony is not to be positively rejected; but, at the same time, no fact stated by a witness open to such just suspicion can be relied on, where he is not corroborated by other evidence (*c*).

How far a person who has subscribed a will, as a witness, may be allowed to impeach his own act.

The statute of frauds would be counteracted, if an unattested codicil were permitted to have any operation

A codicil has no operation upon land, unless duly attested.

(*x*) *Fitzherbert v. Fitzherbert*, and *Wood v. Stane*, *ubi supra*; *Binfield v. Lambert*, 1 Dick. 337. R. 300; *Lowe v. Jolliffe*, 1 W. Bla. 366; *S. C.* 1 Dick. 389; *Goodtitle v. Clayton*, 4 Burr. 2225.

(*y*) *Bernett v. Taylor*, 9 Ves. 382. See, *infra*, as to nuncupative wills.

(*b*) *Bootle v. Blundell*, 19 Ves. 504; *Howard v. Braithwaite*, 1 Ves. & Bea. 208.

(*z*) *Hudson's case*, Skin. 79; *Digg's case*, cited *ibid*.

(*c*) *Kinleside v. Harrison*, 2 Phillim. 499; and see *Burromes v. Lock*, 10 Ves. 474.

(*a*) *Walton v. Shelley*, 1 T.

Distinction as to a paper written before the will, and referred to thereby:

The execution, also, of a power over real estate, when such estate has been parted with by a conveyance to uses, comes under a different consideration.

Effect of a general charge of debts, or legacies, incorporated in a duly attested will.

operation upon land, or the produce of land (*d*); and though, if a testator expressly refer in his will to a paper previously written, describing it so distinctly that there can be no doubt of the identity; and the will be executed in the presence of three witnesses; the paper so referred to, whether attested or not, makes part of the will (*e*): still the difference between such a case, and a reference to a *future* intention, must be evident. Where, indeed, the estate has been parted with, by a conveyance to uses, a power overriding such estate, may, if properly reserved, be executed by any prescribed form of instrument; for, such a power is only collateral to the land: but, it would be nugatory in a testator to attempt to reserve to himself, by a will duly attested, a power to dispose by deed. Such a future disposition must be either by act *inter vivos*, or by will. If by will, to make the disposition valid, as far as it relates to freehold estate, there must be three witnesses. The ownership of the property having been retained, there could be no pretence for referring the act to an execution of a power (*f*). It has, indeed, been repeatedly decided, that, where a testator has, by a will duly attested, charged his real estate with payment of his debts, or legacies generally, debts afterwards incurred, or legacies subsequently given by unattested codicils, are well charged; but these decisions have gone on the ground, that, such legacies are

(*d*) *Hooper v. Goodwin*, 18 Ves. 166. *jean*, 6 Ves. 565.

(*f*) *Habergham v. Vincent*,

(*e*) *Habergham v. Vincent*, 2 Ves. Jun. 228; *Smart v. Pru-*
ubi supra. See, post, p. 270.

are not devised out of land, but are only secured by land, previously well devised; and which merely comes in aid of the personalty (*g*). But, where a *general* charge is not incorporated in the duly attested will, a power reserved therein, by the testator, to charge such legacies as he may afterwards be disposed to bequeath, upon his real estate, would, upon principles analogous to those established in *Habergham v. Vincent*, be inoperative (*h*). However, although, in such a case, new legacies cannot be created; those before given may be modified and altered. The testator cannot, indeed, by an unattested codicil give fresh legacies charged upon land; unless the duly attested will contains a general charge; but he may substitute one legatee for another (*i*).

One legatee may be substituted for another by an unattested codicil.

Where the execution of a will has been obtained by misrepresentation or fraud, it cannot stand: but, in this single instance, as we have seen, Courts of Equity have less complete jurisdiction over fraud, than other Courts. A Court of Equity may, in certain cases, convert the party taking an interest under such fraudulent instrument into a trustee for the party injured (*k*): but cannot set aside the will (*l*). The *animus testandi* is a necessary condition

Equity, though it cannot set aside a will for fraud, may declare the fraudulent party a trustee.

The *animus testandi*; and free agency, necessary to constitute a will;

(*g*) *Habergham v. Vincent*, 2 Ves. Junr. 231, 232; *Hooper v. Goodwin*, 18 Ves. 167; *Sheddon v. Goodrich*, 8 Ves. 495; *Hannis v. Packer*, Ambl. 556; *Brudenell v. Boughton*, 2 Atk. 274.

(*h*) *Rose v. Cunynghame*, 12 Ves. 36; *Bonner v. Bonner*, 13

Ves. 383.

(*i*) *Attorney General v. Ward*, 3 Ves. 331.

(*k*) See *infra*.

(*l*) *Andrews v. Powys*, 2 Br. P. C. 476, 482, fol. edit.; *Kerrick v. Bransby*, 3 Br. P. C.

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therefore, infants, and non-sane persons, can make no will to pass lands; nor can *femes covertes* generally.

At what age infants may dispose of personalty:

the consequent reason for not changing the nature of an infant's property:

dition of a valid will; if a man, merely to escape importunity in his last sickness, sign a paper, professing to be testamentary; this must be deemed, by the competent jurisdiction, an act done under constraint, and not a good will (*m*). Of course, the case would be still stronger if threats, or actual violence, were employed to procure the execution; but in all cases where parties, from unripeness of age, from mental infirmity, or from any other cause, are unable to form, or freely to express, a fair opinion as to the mode in which their property should be distributed after their death; it would be a contradiction in terms to call an instrument, executed by a person laboring under any such incapacity, his *will*. The statutes of wills, therefore, expressly exclude all infants, *non compotes*, and *femes covertes*, from the power of devising lands. The same disability necessarily attaches to persons of non-sane memory with respect to the disposal of personalty. But, the right of determining at what age an infant may make a valid bequest of personal property, rests entirely with the Ecclesiastical Courts (*n*). Those Courts, it seems to be understood, have established, that, a male infant of fourteen years, and a female, if unmarried, of twelve years of age, may make a will of personal estate (*o*). Therefore, as a trustee out of Court would not be permitted to change the nature of an infant's property; so, the Court of Chancery itself, which, in such cases, is only a trustee, even when it finds that a change

(*m*) *Hacker v. Newbarn*, 2 Show. 204. Styles, 427.

(*o*) *Hyde v. Hyde*, Prec. in

(*n*) *Smallwood v. Berthouse*, Cha. 816; *Anonym. Mosely*, 5.

a change would be for the benefit of one of its infant wards, will so deal with the property as not to affect the powers of the infant over the same, even during his infancy; when he has powers over one species of property, not over the other. It may be for the benefit of an infant, in many cases, that money should be laid out in land, if he should live to become adult: but, if he should not, it is a great prejudice to him: taking away his dominion, and the power of disposition he might exercise over personal property, so long before he could devise real estate. On this ground, the Court, if it work any change by converting money into realty, does so, not to all intents and purposes, but, with this qualification;—that, if he live, he may take it as real estate; yet, without prejudice to his right over it during infancy, as personal property (*p*).

or, qualifying the conversion so as not to prejudice the infant's power of disposition.

Coverture excludes a woman, of any age, from the right of making a will, either as to lands or goods, (except such as she holds merely *in autre droit* (*q*),) unless she has acquired that right by special assent of her husband (*r*); or it is a necessary incident of property given, or settled, to her separate use (*s*). Whether such a disposition of property duly made by a *feme covert*, and to take place after her death, be, or be not, in technical strictness, a will; or, whether it ought only to be termed an instrument in writing; are critical nice-

In what cases a *feme covert* may make a disposition of property, to take effect after her death; by writing in nature of a will:

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|---|--|------|
| (<i>p</i>) <i>Ex parte Phillips</i> , 19 Ves. 123. | <i>Wood</i> , Cro. Eliz. 27. | ties |
| (<i>q</i>) <i>Scammel v. Wilkinson</i> , 2 East, 556. | (<i>s</i>) <i>Rich v. Cockell</i> , 9 Ves. 375; <i>Fettiplace v. Georges</i> , 3 Br. 10; <i>Tappenden v. Walsh</i> , 1 Phillim. 352; <i>Grigby v. Cox</i> , 1 Ves. Sen. 518. | |
| (<i>r</i>) <i>S. C. Marriot v. Kinsman</i> , Cro. Car. 220; <i>Eston v.</i> | | |

Such a writing must be proved in the Ecclesiastical Court:

and if made in execution of a power, Chancery will also examine the witnesses.

By what mode a *feme covert* may make a disposition of real estate of inheritance, to take effect after her death, so as to be valid at common Law:

ties which have been warmly disputed (*t*), and which, perhaps, yet remain *in dubio*. Nor, in truth, is the decision very imperiously called for; as it is allowed, on all hands, that, such a writing, if not a proper will, is, at least, of a testamentary nature; that, it must receive probate from the Ecclesiastical Court (*u*); and, that, the Court of Chancery will, then, give it all the effect and operation of a will (*w*). Though, if such testamentary writing be made in execution of a power of appointment, the Court of Chancery will require the witnesses to be examined: for the purpose of holding the instrument to be in the nature of a will, the judgment of the Ecclesiastical Court will be decisive: but, as we have already seen, not so to shew that the appointment has been properly executed (*x*).

Where the wife is empowered by special contract, before marriage, to make a will, the husband cannot, of course, avoid his own engagement: yet, even in this case, such a will, if it relate to real estate of inheritance, (not conveyed in trust,) cannot be supported in a Court of Law (*y*), to the prejudice of her heir; though, if the estate be limited to uses, with a power reserved to the *feme*, before marriage, to declare those uses; in this way, her disposal

(*t*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 75; *Southby v. Stonehouse*, *ibid.* p. 612; *Oke v. Heath*, 1 Ves. Senr. 139.

(*u*) *Ross v. Ewer*, 3 Atk. 160; *Cothay v. Sydenham*, 2 Br. 392; *Stevens v. Bagwell*, 15 Ves. 153.

(*w*) *Cotter v. Laver*, 2 P. Wms. 623; *Henley v. Phillips*, 2 Atk. 48.

(*x*) *Rich v. Cockell*, 9 Ves. 376.

(*y*) *George v. —*, Ambl. 628; *Hodsdon v. Lloyd*, 2 Br. 543; *Peacock v. Monk*, 2 Ves. Sen. 191.

disposal of estates so limited may take effect at common Law (x). But, according to the doctrine of Courts of Equity, a woman may, antecedently to her marriage, retain a power over a legal estate of which she is seised, so as to be enabled to dispose thereof, during her coverture; and, in case she make such a disposition, it is at once effective, provided the prescribed forms have been complied with; if in this respect it be defective, a Court of Equity can, and will, interpose to effectuate it against the heir at Law, if the appointment was made upon a good and meritorious, (though not a valuable) consideration: but, without such consideration the Court will not interfere to aid a defective execution (a). The rule is the same where the wife is only *cestui que trust*; the legal estate being outstanding (b).

and the farther aid which Courts of Equity will lend, to effectuate such dispositions;

whether the estate be a legal one, or in trust.

Where, by contract before marriage, a wife is to have free power to make a will during the whole coverture; a Court of Equity will not act upon any subsequent instrument, the object of which is to put that power under control, in any respect (c). It is to be observed, however, that, when a power is given to a married woman to appoint the uses of land by will, without more; the will must be intended such an one as is proper for the disposition of land; and, consequently, subscribed by three

A power given to a wife to make a will not to be controlled;

but where such power is, to appoint the uses of land, by will; a duly attested will is necessary, in general.

(x) *Doe v. Staple*, 2 T. R. 695. *Rippon v. Dawding*, Ambl. 565.

(a) *Wright v. Cadogan*, 2 Eden, 252; S. C. 6 Br. P. C. 156, (fol. ed.); and see *Peacock v. Monk*, 2 Ves. Sen. 192; (b) *Wright v. Englefield*, Ambl. 473.

(c) *Parkes v. White*, 11 Ves. 231, 234.

three witnesses in the presence of the testator. For, whether such an instrument be, properly speaking, a will, or only in the nature of a will, it is within all the inconveniences which the statute of frauds intended to prevent (*d*). But, this rule will be rigidly adhered to, only when the execution of the power is in favor of mere volunteers; where there appears a meritorious consideration, Equity will, as we have just seen, aid a defective execution (*e*). And, it seems, that, under a special reservation to that effect, a donee of a power, affecting real estate, may well execute the same by a will not attested according to the provisions of the statute of frauds (*f*).

But a power may contain special reservation dispensing with attestation.

How a *feme covert* may acquire a right to dispose of personalty by will:

and where such will is binding only on her hus-

With respect to the disposal of personalty by the will of a *feme covert*, the leading principles seem to be these:—where the marital rights are not, beforehand, limited and restrained by special contract; marriage is, *ipso facto*, a gift to the husband of all the personal estate actually and beneficially possessed by the wife, in her own right, at that time; or which may subsequently accrue to her,—(if not given to her separate use; and subject in certain cases to her Equity to have a settlement thereout (*g*);)—during the marriage. The husband may renounce this right for himself, and wave

(*d*) *Longford v. Eyre*, 1 P. Wms. 741; *Duff v. Dalzell*, 1 Br. 146.

(*e*) *Wilks v. Holmes*, 9 Mod. 486; referred to as the leading case on the subject in *Shannon v. Bradstreet*, 1 Sch. & Lef. 60; *Cotter v. Layer*, 2 P.

Wms. 624.

(*f*) *Bath & Montague's case* 3 Cha. Ca. 69: see, however, the *dictum* of Buller, J. in *Goodill v. Brigham*, 1 Bos. & Pull. 198. See, *ante*, p. 264.

(*g*) *Lumbe v. Milnes*, 5 Ves. 517: see *post*.

wave the claim which would invalidate the wife's disposition by will, of that which, if not disposed of by his consent, must devolve on him, as her executor, if he prove the survivor. But, if the husband die before the wife, her will, made during coverture, is void against her next of kin; the husband, by giving his consent to such will, could only relinquish his personal rights, not those of others; and, if the wife, surviving, make no disposition of her property after the husband's death, she must be held to have died intestate (*h*). For, though it was once held, that, if a woman made a will before marriage, and survived her husband, the will would not be countermanded by the espousals, as it was not to take effect till her death, when she was *sui juris* (*i*); yet, it seems to be now established, at least as a general rule, that the will of a *feme sole* ceases to have any operation after she becomes *coverte* (*k*): that, marriage alone is a revocation of such will (*l*); and, that, as by marriage a woman disables herself from making any other will, the existing instrument must necessarily be void; as it is of the very essence of a will that it should always remain ambulatory (*m*).

band, but is void as against her next of kin; even though she survive her husband.

Any consent on the part of a husband, given after marriage, that his wife may dispose of personalty by will, if such consent rest merely in agreement between

In what case a husband may retract his consent, given after marriage, allowing his wife to make a will.

(*h*) *Stevens v. Bagwell*, 15 Ves. 156.

(*i*) *Brett v. Rigden*, Plowd. 343.

(*k*) *Doe v. Staple*, 2 T. R. 695.

(*l*) *Cotter v. Layer*, 2 P. Wms. 624.

(*m*) *Hodsden v. Lloyd*, 2 Br. 544; *Matthews v. Warner*, 4 Ves. 210; *Hobson v. Blackburne*, 1 Addams, 278.

between the parties themselves, and be not guaranteed by bond, may be retracted, at any time before assent given by the husband to the probate of such will (*n*). It has even been said, (and that by a Judge of no less name than Lord Nottingham,) that, although the wife should make the husband her executor, and he prove the will, yet, he is no farther bound than in honor to perform it (*o*). With submission, however, he certainly would seem, in such case, to be further bound, by the oath, which is required from every executor before probate is granted to him, that, he will truly perform the will, and pay all the legacies of the deceased (*p*). And though in *Chiswell v. Blackwell* it was declared, that, if a bond be given to perform the will of a married woman, and she make a will, it hath the import of a writing, and nothing else; yet, an agreement manifested by such a bond, given by the husband before marriage, would, indisputably, be binding on the husband himself; and would estop the claims of the wife's heir, in respect of her freehold estates (*q*). This decision, of Lord Camden's, went to the point which Lord Hardwicke had previously thrown out, but which the last named Judge was not called on to determine. In *Peacock v. Monk* (*r*), Lord Hardwicke put the question thus:—Can a woman, by bare agreement, before marriage, without doing any thing to alter the nature

An agreement by the husband that the wife shall be at liberty to dispose by will; if evidenced by bond, will estop, in Equity, not only the claims of the husband, but, of the wife's heir, in respect of her real estate.

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|---|---|
| (<i>n</i>) Swinb. part 2, sect. 9. | <i>Anon.</i> 1 Ventr. 335: and see |
| (<i>o</i>) <i>Chiswell v. Blackwell</i> , 2 Freem. 70. | <i>Brook v. Turner</i> , 2 Mod. 172. |
| (<i>p</i>) Lindw. 177; <i>Rex v. Raines</i> , 1 Lord Raym. 363; | (<i>q</i>) <i>Rippon v. Dawding</i> , Amb. 565. |
| | (<i>r</i>) 2 Ves. Senr. 191, 192. |

nature of the estate, bar her heir? If so, his Lordship intimated, it must be upon the principle, that, the agreement would give the wife a right to come into a Court of Equity, after marriage, to compel the husband to carry his engagement into execution, and to join with her in a fine to resettle the estate; and, then, the consideration would be, whether her heir at law was not bound by the consequences of that agreement? The affirmative was resolved, as we have seen, by Lord Camden; as it had, previously, been by the highest tribunal of the realm (*s*). And, as against the husband, a bond given by him after the marriage, for the purpose of securing to his wife permission to make a will of personalty, has been held obligatory, even at common Law (*t*); as also, that the disposition made by her, if not good strictly as a will, should operate as an appointment: which decision appears to have been recognized as sound law, by Lord Hardwicke (*u*).

And, as against the husband, his bond, given after marriage to allow his wife to bequeath personalty, is obligatory.

Since the incapacity of a *feme covert* to make a will arises out of a consideration partly of her dependent situation, which subjects her to undue influence, and partly out of a regard to the marital rights of her husband; where neither of these causes can operate, it is but just that the effect should cease: when the husband, therefore, is, by competent authority divested of all legal rights, or banished

Where the husband is divested of all legal rights, the wife may make a will as if she were a *feme sole*.

(*s*) *Wright v. Cadogan*, 6 Br. Parl. Ca. 156, fol. edit.

(*u*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Senr.

(*t*) *Marriot v. Kinsman*, Cro. Car. 219.

75.

banished for life, the wife may make a will as if she were a *feme sole* (*w*).

Stock transferred into the name of a married woman, survives to her, if her husband never reduced it into his own possession.

Stock, transferred into the name of a married woman as next of kin of an intestate, (or, it should seem, in any other right,) will survive to her, on the death of her husband, and not belong to his representatives; if he, in his lifetime, did no act reducing into his own possession what is considered as a *mere right*; the interest in stock being, properly, nothing but a right to receive a redeemable annuity; and the demand of dividends as they become due having no resemblance to a chattel capable of possession and manual apprehension (*x*).

A promise, by which the insertion of a bequest in a will is prevented, raises a trust:

Should an heir, or personal representative, whose interests would be affected by the regular insertion of a bequest in a will, induce the testator to omit making a formal provision for an intended object of his bounty, by assurances, that, the testator's wishes shall be as fully executed as if the bequest were formally made; this promise and undertaking will raise a trust; which, though not available at common Law, will be enforced in Equity, on the ground of fraud (*y*). And such an engagement may be entered into, not only by words, but, by silent assent to such a proposed undertaking; which, under these circumstances, will equally raise

As a silent assent to a proposed engagement, will, in such case, equally do;

(*w*) *Countess of Portland v. Prodgers*, 2 Vern. 103.

(*x*) *Wildman v. Wildman*, 9 Ves. 177; *The King v. Capper*, 5 Pr. 263; *Scawen v. Blunt*, 7 Ves. 300.

(*y*) *Chamberlain v. Agar*, 2

Ves. & Bea. 262; *Mestair v. Gillespie*, 11 Ves. 688; *Stickland v. Aldridge*, 9 Ves. 519; *Barrow v. Greenough*, 3 Ves. 154; *Chamberlayne v. Chamberlayne*, 2 Freem. 34; *Oldham v. Litchford*, 2 Freem. 285.

raise a trust (x). And, of course, the case would be still stronger, if the due insertion of the bequest in the will had been prevented by any violent interference (a). a fortiori, where the insertion of the bequest is prevented by violence.

If a pecuniary legacy be bequeathed by will not attested as by law is required for the purpose of passing freehold estate; but, under an express condition to give up a real estate, by that unattested will attempted to be disposed of; this condition, expressed in the body of the will, raises a case of election. But, if there be nothing in the will further than a mere devise of real estate, such unattested instrument is not capable of being read in a Court as to that part; and unless, according to an express condition, the legacy was so given that the legatee should not take without complying with that condition, it is not a case of election. The reason of that distinction, if it were *res integra*, might be questionable; but, it has been too long settled to be brought into doubt (b). Subject to this qualification, it is one of the plainest general principles of Equity, that, a person who accepts a benefit under a will, must not refuse compliance with the conditions (if legal) with which the bounty was coupled (c). This doctrine extends to every other species of instrument as well as to wills (d); but, though the principle be the same, When a case of election, as to real estate, is raised by an unattested will; and when not.

The general principle of Equity, that no one who accepts a benefit, must refuse compliance with the conditions with which it is coupled; extends to other instruments, as well as wills:

(x) *Byrn v. Godfrey*, 4 Ves. 10; *Paine v. Hall*, 18 Ves. 475. *ford*, 18 Ves. 223; *Ex parte The Earl of Ilchester*, 7 Ves. 372, 378. See post, p. 277.

(a) *Dixon v. Olmius*, 1 Cox, 414: see ante, pp. 265, 266. (c) *Lady Cavan v. Pulteney*, 2 Ves. Junr. 560; *Whistler v.*

(b) *Sheddon v. Goodrich*, 8 Ves. 497; *Thelluson v. Wood-* *Webster*, *ibid.* p. 372. (d) *Cummins v. Forester*, 2

and its application seems more rigid with respect to deeds, than to wills; non-compliance with a condition in the former, causes a total forfeiture; but, in the latter case, compensation to the disappointed party seems sufficient.

same, its application seems to be more restricted with respect to wills. An express condition in a deed, or settlement, must be strictly performed, or a total forfeiture will be incurred; but, it may be at least questioned, whether, when an implied condition arises under a will, the devisee is bound to do more than make compensation, for withholding that which was intended by the testator for another (*e*). The authorities upon the subject are various, not to say irreconcilable; they were reviewed, in a modern case, by Lord Eldon; and the leaning of his Lordship's opinion seems, pretty plainly, (according to Mr. Vesey's report,) to have been, that, *as applied to a will*, the doctrine of election does not infer the necessity of a literal compliance with the will, on pain of a total forfeiture; but, that the devised interest is to be sequestered *quousque*, as the phrase is; or, until satisfaction be made to the disappointed object of the testator's bounty (*f*).

Generally speaking, a devise not duly executed will not raise a case of election:

A will, purporting to dispose of real estate, if not executed according to the statute of frauds, can have no operation, even to raise a case of election,

Jac. & Walk. 345; *Moore v. Butler*, 2 Sch. & Lef. 266.

(*e*) *Welby v. Welby*, 2 Ves. & Bea. 191; *Dashwood v. Peyton*, 18 Ves. 49; *Blake v. Bunbury*, 1 Ves. Junr. 523; *Rancliffe v. Parkins*, 6 Dow, 179; and see other cases collected under the head of "Settlement and Conveyance."

(*f*) *Green v. Green*, 19 Ves. 669; *S. C.* 2 Meriv. 95. That

such was the inclination of his Lordship's judgment, will appear confirmed by a reference to his subsequent observation in *Rancliffe v. Parkins*, *ubi supra*; and to his previous decision in *Dashwood v. Peyton*, also before cited. The best comments on judicial *dicta*, must always be decisions, made by the same Judge, *in consimili casu*.

tion, against a person taking a benefit in the personal estate (*g*): unless such benefit be given upon a condition, distinctly expressed in the body of the imperfectly attested will, that, the legatee shall not take the benefit intended for him, unless he will give up a real estate, by such unattested will attempted to be disposed of. There, as we have before seen, the party cannot claim his legacy, if he refuse to comply with the express condition on which it is made to depend (*h*). The doctrine of election is utterly inapplicable to creditors taking the benefit of a devise for payment of debts, and also enforcing their legal rights against other funds disposed of by the same will of their debtor (*i*).

but, where personalty is bequeathed, subject to a previous condition affecting land; there, although the will has not three witnesses, the legacy cannot be claimed till the condition is performed.

Election not enforced against creditors.

In all cases to which the doctrine of election applies, Courts of Equity, whilst they enforce the rule, that a party shall not claim both under and in total contradiction to a will, secure to him an option; and will not conclude him by equivocal acts, performed, possibly, in ignorance of the value of the respective interests; nor compel him to make his election before that point is ascertained (*k*): for which purpose he is at liberty to file a bill to have the accounts taken, and the property cleared; that he may elect to the best advantage (*l*).

Election not compelled before the value of the several interests is ascertained;

for which purpose the party may file a bill to have the accounts taken.

A valid election by a *feme coverte*, it has been said,

How the election of a *feme co-*

(*g*) *Ex parte The Earl of Ilchester*, 7 Ves. 372; *Thelluson v. Woodford*, 13 Ves. 223.

Ves. 154.

(*h*) *Sheddon v. Goodrich*, 8 Ves. 497; *Boughton v. Boughton*, 1 Ves. Senr. 15: see, *ante*, p. 275.

(*k*) *Dillon v. Parker*, 1 Swanst. 381; *Chalmers v. Storil*, 2 Ves. & Bea. 225.

(*i*) *Kidney v. Cousmaker*, 12

(*l*) *Butricke v. Broadhurst*, 1 Ves. Jun. 172; *Wake v. Wake*, *ibid.* p. 336; *Kidney v. Cousmaker*, 12 Ves. 153.

verte must be declared, generally speaking; and why that form is required:

but such election may also be inferred, from her continued enjoyment of one of the interests.

Other claimants may compel the election of a *feme covert* within a reasonable time.

A widow can be compelled to elect between

said, can be made only on personal appearance in Court, or, if she be resident abroad, before commissioners duly appointed: otherwise, her husband might make a collusive bargain, with a view to his own exclusive interests (*m*). And this principle, at least, if not the form, will be enforced, in protection of the wife, although her election should have the effect of ousting the husband's contingent claim to become tenant by the courtesy; for that interest is only an emanation from the wife's estate (*n*). But it has been decided, that, although the election of a *feme covert* has not been made in the prescribed form above mentioned, it may be judicially inferred, from her continued acceptance and enjoyment of one of the interests, between which she had to choose (*o*). As the rights of other claimants under a will may be materially affected by a delay on the part of a married woman in making her election; she will, on a proper application, be directed to elect within a limited time (*p*): if she fail to do this, it will be referred to one of the Masters to inquire which claim would be most beneficial to her; and, upon the coming in of his report, a decretal order will be made in conformity thereto (*q*).

With respect to election by widows between dower and provisions under the wills of their husbands,

(*m*) *Parsons v. Dunne*, 2 Ves. Senr. 61.

(*n*) *Lady Cavan v. Pulteney*, 2 Ves. Jun. 560.

(*o*) *Ardesoife v. Bennet*, 2 Dick. 467: see post, p. 281.

(*p*) *Vane v. Lord Dungan-*

non, 2 Sch. & Lef. 133.

(*q*) *Earl of Darlington v. Pulteney*, 3 Ves. 385; *Lady Cavan v. Pulteney*, *ubi supra*; *Davis v. Page*, 9 Ves. 351; *Wilson v. Townsend*, 2 Ves. Jun. 696.

lands, it seems well established, that, as dower is a legal right, the intention to exclude that right, by a bequest, must be demonstrated, if not by express words, at least by necessary implication. It is only where the claim of dower would be inconsistent with the will, or plainly tend to defeat some other part of the testator's disposition of his property, that the widow can be compelled to elect (*r*). Of course, a bequest of personalty, unless an intention to that effect be distinctly expressed, can never operate in bar of dower (*s*): nor will a devise of part of the lands out of which a widow might claim dower, bar that claim with respect to the remainder of such lands (*t*), unless the terms of the devise express, or clearly imply, that, it was the testator's intent, the bequest of part of the lands should be in satisfaction of dower in the remainder (*u*).

dower and a provision under her husband's will, only when the intention to raise such election is quite clear:

even a devise of part of the lands will not, necessarily, bar a widow's right to dower out of the remainder.

An able writer (*w*) has observed, that, the adjudged cases say nothing as to the question whether, when the whole of the husband's lands are devised to his widow, she may take two-thirds of them as a purchaser under the will, and the remaining one-third under her title to dower. By analogy,

Where the whole of the husband's lands are devised to his widow, she may take two-thirds as purchaser, and the other third under her title to dower.

(*r*) *Strahan v. Sutton*, 3 Ves. 252; *Thompson v. Nelson*, 1 Cox, 447; *Pearson v. Pearson*, 1 Br. 292; *Birmingham v. Kirman*, 2 Sch. & Lef. 452; *Greatrex v. Cary*, 6 Ves. 616.

234; *Birmingham v. Kirman*, 2 Sch. & Lef. 454; *Lord Dorchester v. Lord Effingham*, Cooper, 324; *Hitchins v. Hitchins*, 2 Freem. 241.

(*s*) *Ayres v. Willis*, 1 Ves. Senr. 230.

(*u*) *Chalmers v. Storil*, 2 Ves. & Bea. 224.

(*t*) *Lawrence v. Lawrence*, 1 Br. P. C. 591; *S. C.* 2 Freem.

(*w*) Mr. Roper: see his Treat. on Husb. and Wife, vol. 1, p. 561, 562.

logy, however, it is inferred, that, she may do so. And, where the lands have been incumbered during the marriage, the advantage which the widow may derive from enjoying one-third by title paramount, and therefore free from such incumbrances, is obvious (*x*).

A devise to a widow of a contingent remainder for life, of lands out of which she is dowerable, does not exclude her immediate title to dower.

The immediate title to dower, it is settled, will not be excluded, by implication from a devise to the widow of a contingent remainder, for life, in the very lands out of which she demands dower: there is nothing inconsistent in the two interests (*y*): and, where a clear, incontrovertible, result does not arise from the husband's will, that he meant to exclude his widow from dower, she will not be put to election: he may not have known, that, she was, under the circumstances, dowerable; but, that will not do: it must appear, that, he did know it, and meant to bar her; or, that, what she demands, is repugnant to the dispositions he has made (*z*).

The title to dower will not be barred by a mere devise of the husband's estates to trustees, charged with either a gross sum, or an annuity, to his widow:

A devise to trustees of all a testator's real estates, in trust, in the first place, to pay a certain sum to his widow, will not, of itself, afford a sufficient indication of the testator's intention, to bar the right of dower (*a*). Upon a similar principle, if the testator has devised his estates to trustees, charged, not with payment of a gross sum, but, with

(*x*) The author just cited adds, that "for the remaining two-thirds she would be able to contribute with the owners of the remainder of the lands, in discharge of the incumbrances;" he therefore, evidently, intends to put the case of a devise to the

widow for life, with remainder over.

(*y*) *Inclendon v. Northcote*, 3 Atk. 435.

(*z*) *French v. Davies*, 2 Ves. Jun. 577, 581.

(*a*) *Thompson v. Nelson*, 1 Cox, 447.

with an annuity to his widow; still, as a wife's title to dower is paramount, it seems, according to the current of modern decisions, (though it has, formerly, been held otherwise (*b*),) a Court of Equity will not infer, that, because a testator has given all *his* property to trustees, it was necessarily his intention to give them that which was *not his* (*c*). But, though this would be inadmissible as a general construction, circumstances may justify it (*d*); if the estates would be insufficient to satisfy the charges expressly imposed upon them, in case the title to dower was sustained; *that* might shew an intention to bar the claim of dower; and, it seems, a reference to ascertain that fact will be granted (*e*).

but, where other objects of the trust would be defeated if the title to dower were sustained, that might shew an intention to bar the claim of dower.

If a testator bequeath to his wife £1,000 *per annum* in lieu of dower, but, with a proviso, that, in case she marries again, she shall have only £100 *per annum*, in lieu of all benefits which, it was the testator's meaning, should arise to her out of all his real and personal estates; this proviso will not prevent the widow's right of election: but, on the other hand, she cannot take both her dower and the annuity of £100 *per annum* (*f*).

Where an annuity is bequeathed in lieu of dower, with a proviso, reducing it in case the widow marries again; the widow may elect.

It

(*b*) *Arnold v. Kempstead*, 2 Eden, 236; *Villa-Real v. Lord Galway*, Ambl. 683.

(*c*) *Foster v. Cook*, 3 Br. 351; *Pitts v. Snowden*, 1 Br. 292, note; *Greatrex v. Carey*, 6 Ves. 616; *Birmingham v. Kirwan*, 2 Sch. & Lef. 453.

(*d*) *Druce v. Dennison*, 6 Ves. 400.

(*e*) *Pearson v. Pearson*, 1 Br. 292; *French v. Davies*, 2 Ves. Jun. 580.

(*f*) *Boynton v. Boynton*, 1 Br. 446: *quære*, whether the election ought not to be made in the first instance, and not delayed till the widow has had long enjoyment of the larger provision? see, *ante*, p. 278.

If a man devise land away from his heir, giving his wife a provision in bar of dower; should the devise lapse, the heir will take the estate exonerated from dower.

So, where, by contract, the wife has relinquished all claims as to her husband's personality; there, if he die intestate, his next of kin take the whole: but, where the case does not turn upon contract, and the particular objects of the husband's bounty, designated by his will, cannot take, the widow is not barred.

A proviso, in a deed of separation, that the wife shall be entitled to her thirds of the husband's personality at his death, exactly as if she were living with

It is clear, that, if a man devise his real estate from his heir, after giving his widow a provision in lieu, satisfaction, and bar of dower; and the devisee die in the lifetime of the devisor; the heir will take the estate, exonerated from the widow's claim of dower. She could not say her dower was intended to be satisfied only in favor of that devisee, and not for the general benefit of the real estate. A similar principle applies with respect to personality, in cases where it has been agreed by contract, before marriage, that, the wife's claims in respect thereof shall be barred: there, although the husband die intestate, the next of kin take, without any reference to the widow. But, where the question does not turn upon contract, and it merely appears, that, a testator has given his wife a provision by will, which he meant to be a satisfaction for any claim she might have, interfering with the other express objects of his bounty; if, by accident, those objects should be unable to claim the benefit of that exclusion, no other persons can set it up against the widow; and her claim under the statute of distributions will not be barred (*g*).

A deed of separation however, containing a proviso, that, if the wife shall survive the husband, and be living separate from him at the time of his death, she shall be entitled to her thirds of his personality, any thing in the said deed of separation to the contrary notwithstanding: will be construed, not

(*g*) *Pickering v. Lord Stamford*, 3 Ves. 330; *S. C.* on appeal, *ibid.* p. 498; *Leake v. Robinson*, 2 Meriv. 324; *Waring v. Ward*, 5 Ves. 676: see *post*.

not as an absolute covenant, on the part of the husband, to leave her such a portion of his personal estate as she would be entitled to under the statute of distributions; but, that, although living separate, she should take just as she would if living with her husband: and that agreement could not interfere with his testamentary dispositions, or prevent his bequeathing his personal property, as if no such proviso had been inserted in the deed of separation (*h*).

him; will not prevent his disposal of the whole, by will.

If a man, on his marriage, covenant, that, his executors shall, within three months after his decease, pay to his wife, if she survive him, a certain sum; should the husband die intestate, and the wife become entitled under the statute of distributions to a larger sum than that mentioned in the covenant; this distributive share will be taken in performance of the said covenant: such a construction would be still more unobjectionable in a case where the wife, as administratrix, could immediately pay herself (*i*): though it has been repeatedly decided, that, this circumstance is not necessary to support the principle; indeed it is plain, that, if it were, the rule would become inoperative altogether, as the widow would of course never take out administration, if the effect were to be that of barring claims, which she might otherwise make available (*k*). And a Court of Equity will not re-

A widow's distributive share under her husband's intestacy, held a performance of his covenant, that his executors should pay her a smaller sum.

Equity will not regard the slight

(*h*) *Cochrane v. Graham*, 19 *Goldsmid*, 1 *Swanst.* 217.
Ves. 65. (*k*) *Gartshore v. Charlie*, 10
 (*i*) *Blandy v. Widmore*, 1 *P.* *Ves.* 12; *Lee v. Cox*, 3 *Atk.*
Wms. 324; *Twisden v. Twis-* 421.
den, 9 *Ves.* 426; *Goldsmid v.*

distinction of "leaving" and "paying;" nor a trifling difference as to time; which is of less weight in cases of performance, than in cases of satisfaction.

But, where a covenant for the benefit of the wife, requiring performance in the husband's lifetime, has been broken, a debt is thus constituted, which will not be satisfied by a distributive share under his intestacy; nor by a benefit given by his will; though in the latter case the terms of the gift may raise a case of election.

Land no satisfaction for mo-

gard the nice distinction between "leaving" and "paying;" nor whether the payment is to be within three or six months; which difference, although in cases of satisfaction, (where the parties did not stand in the relation of parent and child,) it has been considered material, has little weight with Courts of Equity in cases of performance (*l*).

But, where a covenant for some pecuniary benefit to the wife has been so framed as to require performance in the lifetime of the husband; and such covenant has been broken by him, so as to constitute a debt before his death; this debt would not be satisfied by any uncertain interest the wife might derive, in case of his intestacy, under the statute of distributions (*m*): for, where the question is one of satisfaction, the rule is, that, the satisfaction must be complete; and a debt can only be satisfied by something equally certain and beneficial (*n*). It is, also, a general rule, that, nothing can be considered a satisfaction, which is not exactly of the same nature: this rule applies equally to cases of testacy or intestacy, unless, in the former case, there be such a clear indication of the testator's intention as may make an election indispensable (*o*).

Still, although, as a general rule, land be no satisfaction

(*l*) *Gartshore v. Chalie*, 10 Ves. 8, 13: see, *infra*, as to Satisfaction of Portions.

(*m*) *Oliver v. Brickland*, cited in *Lee v. Cox*, 3 Atk. 422.

(*n*) *Couch v. Stratton*, 4 Ves. 394; *Crompton v. Sale*, 2 P. Wms. 554; *Graham v. Gra-*

ham, 1 Ves. Senr. 263.

(*o*) *Barrett v. Beckford*, 1 Ves. Senr. 521; *Eastwood v. Vincke*, 2 P. Wms. 616; *Forsight v. Grant*, 1 Ves. Junr. 298; *Richardson v. Elphinstone*, 2 Ves. Junr. 464; *Devese v. Pontet*, 1 Cox, 192.

tisfaction for money, nor money for land; yet, it does not necessarily follow, that, the rule which holds nothing to be a satisfaction which is not precisely *ejusdem generis*, is universally applicable; on the contrary, it appears to have been held, that, a portion, though not a debt, may be satisfied by the bequest of a residue; where the amount of such residue, though not precisely ascertained, clearly exceeds that of the portion (*p*).

ney; nor money for land: but the rule, that, nothing is a satisfaction of a claim which is not precisely *ejusdem generis*, not universal.

Where the question is one, not of satisfaction, but, of performance, the same principles are applied to a part performance as if it were complete: thus, if the distributive share accruing to a woman under her husband's intestacy would, if equal in amount, be a performance of her husband's covenant, securing to her a certain sum; there, if the distributive share prove less than she was entitled to by covenant, it will still be a performance *pro tanto* (*q*). And though Lord Thurlow appears to have considered this as a point by no means settled in his time (*r*); yet his Lordship did not decide in contradiction to the rule above stated; indeed, the case before his Lordship hardly called for any observation on the subject; as that case turned upon a special proviso in a settlement.

Where the question is one of performance, not of satisfaction, a distributive share accruing under a covenantor's intestacy, though less in amount than the sum covenanted for, is a performance *pro tanto*.

An observation made by Sir Wm. Grant, that, the provision in the statute of distributions, as to bringing all advancements to *children* into hotchpot,

The proviso in the statute of distributions, requiring children's advances

(*p*) *Bengough v. Walker*, 15 in *Devese v. Pontet*.

Ves. 513; *Rickman v. Morgan*, (*q*) *Gartshore v. Chalie*, 10

2 Br. 394: and see *Gartshore v.* Ves. 14. See, *suprà*, p. 283.

Chalie, 10 Ves. 13, 15: all which (*r*) *Kirkman v. Kirkman*, 2

Br. 100.

to be brought in-
to hotch-pot, ap-
plies only to cases
of actual intesta-
cy: but this has
nothing, appa-
rently, to do with
the doctrine that
the distributive
share taken by a
widow, under the
quasi intestacy of
her husband,
shall be a per-
formance, in
whole or in part,
of his covenant
that she should
receive a fixed
sum at his death.

pot, applies only to the case of actual intestacy (s); has been thought (t) repugnant to the doctrine, that, the distributive share of a widow, in the case of a *quasi intestacy*, ought to be considered a performance of a covenant by which the husband engaged that she should receive a fixed sum at his death; provided her share prove equal to that sum (u). The repugnancy is not clear, and the objection seems hyper-critical: Sir Thomas Plumer did not say, in *Goldsmid v. Goldsmid*, that, in the case of an equitable intestacy, the property was distributable under the statute; nor did Sir William Grant assert, in *Walton v. Walton*, that, there would be any difference as to the *quantum* of benefit which a widow would take under an actual or a *quasi-intestacy*. If, therefore, the widow obtain, in both cases equally, that for which she contracted, it seems difficult to contend, that, a share taken under an equitable intestacy is not a performance; when the same share taken under an absolute intestacy indisputably is so. Every rule and principle established in one case applies to the other; the doctrine in both turns upon the fact, that, the widow, in that character, receives a proportion of the assets, by operation of Law, equalling, or exceeding, the amount which she was entitled to receive under her marriage contract (w). To hold that to be no performance in one of these cases, which

(s) *Walton v. Walton*, 14 Swanst. 221.
Ves. 324: see, as to hotch-pot,
post.

(t) 2 Rep. Husb. & Wife, 52.

(u) *Goldsmid v. Goldsmid*, 1

(w) S. C. *ibid.* *Wilson v. Piggott*, 2 Ves. Junr. 356;
Richardson v. Elphinstone, 2
Ves. Junr. 464.

which is clearly a performance in the other, would be to proceed on "those nice distinctions and very slight arguments, which" (in the words of Lord Hardwicke) "would never stand with the judgment of mankind (x)."

A wife cannot claim under a bequest to the next of kin to her husband (y); nor a husband under a similar bequest to, or settlement in favor of, the next of kin to his wife (z): for, as a general rule, no one is held to come within this description, who is not included in the provisions of the statute of distributions, which, it has been judicially decided, by the word "kindred," means only relations by *blood* (a). And the same construction naturally arises upon the statute for regulation of probates (b). But, although the *prima facie* construction of a bequest by a man to his "next of kin" be in exclusion of his wife; (and, of course, the same principle applies, *mutatis mutandis*, where the bequest is to a woman's next of kin;) yet, on the other hand, it is competent to, and required from, a Court of Equity to look through the whole will; and to see whether, from the whole, an intention appear manifested to include the wife amongst those who, in strictness, are the next of kin;

Generally speaking, a husband cannot claim under a bequest to the next of kin to his wife; nor, *vice versa*, for this description includes only relations by blood:

but Equity will look through the whole will, to see whether this *prima facie* construction of the words "next of kin" be not controlled by the apparent intention of the testator.

(x) *Lee v. Cox*, 3 Atk. 422.

1 Swanst. 39.

(y) *Davies v. Bailey*, 1 Ves. Senr. 84; *Worsley v. Johnson*, 3 Atk. 761.

(a) *Davies v. Bailey*, *ubi supra*; *Worsley v. Johnson*, *ubi supra*.

(z) *Anderson v. Danson*, 15 Ves. 537; *Bailey v. Wright*, 18 Ves. 55; *S. C.* on appeal,

(b) Stat. 21 Hen. 8, c. 5, s. 3: see *Watt v. Watt*, 3 Ves. 247.

kin; a description which, in the ordinary sense of the word, she does not answer (c).

A widow's right to *paraphernalia* preferred to the claims of legatees; but not to those of creditors, where the latter have not other means of satisfying their demands.

The right of a widow to *bona paraphernalia* is preferable to that of a legatee, but, it should seem clear, it ought to give place to the demands of her deceased husband's creditors (d); though this last restriction appears to have been qualified, so far as to delay payment of debts, by the decisions which hold, that, where creditors would not ultimately suffer, the widow is entitled to her *paraphernalia*, notwithstanding her husband's personal estate be insufficient to satisfy his debts, if he have devised a real estate, subject to a charge in aid of his personal assets (e).

Whether a Court of Equity can elect for an infant, which of two provisions under a will he shall abide by?

We have seen, that, a *feme covert* will be compelled to elect between two conflicting interests, within a reasonable time; in order that other just claims may not be affected by her delay; and also, that, a reference to the Master to determine for her is not unusual. The principle seems equally applicable to the case of an infant; but the preponderance of decided cases, in point of number, at least, appears to establish, that, a Court of Equity cannot elect for an infant, which of two provisions under a will he shall abide by; but that, such election must be suspended until he reach his

(c) *Garrick v. Lord Camden*, 2 Freem. 63.
14 Ves. 382.

(d) *Campion v. Cotton*, 17 Ves. 273; *Tipping v. Tipping*, 1 P. Wms. 729; *Flay v. Flay*,

(e) *Boynton v. Boynton*, 1 Cox, 106; *Northey v. Northey*, 2 Atk. 78: and see *Tipping v. Tipping*, *ubi supra*.

his full age (*f*); or, in case of a portion payable at an earlier period, until such portion become due (*g*). There are, however, several authorities for concluding an infant, in such cases, by a reference to the Master (*h*): and there seems sound principle for maintaining, that, the incapacity of a party to elect for himself, ought not to delay the distribution of property, to the prejudice of others (*i*).

By the 19th section of the statute of frauds, it is enacted, that, no nuncupative will shall be good, where the personal estate thereby bequeathed exceeds the value of thirty pounds, unless it be proved by the oaths of three witnesses who were present at the making thereof; and unless it be also proved, that, the testator, at the time of pronouncing the same, bade the persons present bear witness, that, such was his will, or to that effect; and unless such nuncupative will were made during the last sickness of the deceased, and in the house of his habitation, where he hath been resident ten days at least before the making of such will; except where such person was surprized by sudden illness when absent from his home, and died before he returned to the place of his dwelling. But, the

Legislative precautions, guarding against fraud in setting up nuncupative wills:

How they are to be proved; and at what time, and in what place, they ought to be made.

23rd

(*f*) *Bor v. Bor*, 5 Br. P. C. 173, fol. edit.; *Thomas v. Gyles*, 2 Vern. 232; *Streatfield v. Streatfield*, Ca. temp. Talb. 183; *Boughton v. Boughton*, 2 Ves. Sen. 16: and see *Moore v. Butler*, 2 Sch. & Lef. 267.

bouverie, Ca. temp. Talb. 136.

(*h*) *Chetwynd v. Fleetwood*, 4 Br. P. C. 440; *Goodwyn v. Goodwyn*, 1 Ves. Sen. 228; *Bigland v. Huddleston*, 3 Br. 285, note; *Gretton v. Hamard*, 1 Swanst. 413.

(*g*) *Rushout v. Rushout*, 3 Br. P. C. 138; *Hervey v. Des-*

(*i*) *Wilson v. Townsend*, 2 Ves. Jun. 697.

Exception as to soldiers and sailors, on actual service.

Such wills ought to be reduced into writing, within six days after the verbal disposition:

And probate thereof not to be granted, without notice to the widow or next of kin.

A nuncupative will, unless committed to writing in the lifetime of the testator, and read to him, cannot repeal a previous, and operative, written will.

A nuncupative will is rendered void by the death of one witness

23rd section of the statute provides, that, soldiers, being in actual military service; or seamen, being at sea; may dispose of their personal estate as they might have done before the act was passed.

The 20th section of the act declares, that, when six months have passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any nuncupative will; except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will. And, by the 21st section, as a further security against fraud, it is enacted, that, no probate of any nuncupative will shall be granted till fourteen days, at least, after the decease of the testator; nor at any time afterwards, unless process have issued to call in the widow or next of kin to the deceased; to the end, that, they may contest the said will if they please. The 22nd section prohibits the operation of any nuncupative disposition, in repeal or alteration of any will in writing; unless the will declared by word of mouth be, in the lifetime of the testator, committed to writing, and read to, and approved by, him: but, if a legacy, given by a written will, lapse, or be void; *quatenus* the subject of such legacy there is no written will; and a nuncupative codicil is *quasi* an original will for so much; not an alteration of that disposition which had previously become determined (*j*).

The opportunities of committing fraud would be so great, if any laxity in the proof of nuncupative wills were admitted, that, more strict caution is, properly,

(*j*) *Stonywell's case*, T. Raym. 334.

properly, observed with regard to these, than, in some respects, is applied to wills regularly made. thereto, before it has been formally proved.

Thus, as we have seen, at common Law a devisee is not bound to prove the execution of the will by the oath of more than one of the attesting witnesses; and, it may be added, that, if *all* the witnesses be dead, still the will may be proved (*k*), by proper evidence of the handwriting of the testator and the witnesses: and, though the Court of Chancery, as a general rule, requires the examination of all the witnesses, yet we have adduced numerous cases of well founded exception to that rule (*l*): but, with respect to nuncupative wills, the statute of frauds is imperative, that, such will must be proved by the oaths of three witnesses; not merely that three witnesses shall have been present. The death of one of the witnesses before such proof has formally been made, will render the nuncupative will void; however clear and unquestioned the evidence of two surviving witnesses to the transaction may be (*m*).

But, though a nuncupative will, if deficient in any of the forms prescribed by the statute, cannot take effect as a will, it may be sufficient to raise a trust; if the circumstances are such that the mischief which the statute of frauds and perjuries was intended to prevent cannot possibly arise. Thus, where a testatrix, having previously devised her whole personal property to her mother, on her death-bed desired her said mother, if she thought fit,

But, though a nuncupative disposition cannot take effect as a will, when deficient in any of the forms required by the statute; it may, (in some cases) be sufficient to raise a trust:

(*k*) *Brice v. Smith*, Willes, 2; *Croft v. Pawlet*, 2 Str. 1109.

(*l*) See, *ante*, p. 262.

(*m*) *Phillips v. The Parish of St. Clements Dane*, 1 Equ. Ca. Ab. 404.

fit, to give the niece of the testatrix a certain sum: though there was no ground for holding this to be a legacy, as the words were not reduced into writing within the prescribed time; yet, as the mother, by her answer to a bill in Equity, admitted the facts, these were held to create a trust. It was observed, however, that, if the defendant had insisted on the statute of frauds and perjuries, the Court would not, as this case stood, have relieved the plaintiff as upon a trust; (though it is not universally necessary, that a trust relating to personalty should be created by writing,) but, here, the defendant having confessed the trust, there was no danger of perjury; and, therefore, the case came not within the purview of the act (n).

for it is not universally necessary that a trust relating to personalty should be created by writing.

Enactments of the statute of fraudulent devises, in favor of specialty creditors.

Antecedently to the statute of fraudulent devises (o), a debtor had it in his power to disappoint his specialty creditors of all remedy, for their just debts, against his lands, by devising them: but, by this statute it is enacted, that, all wills, dispositions, or appointments, of or concerning lands or hereditaments, (or any profit or charge out of the same,) whereof any person at the time of his decease shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by his last will; shall, as against his specialty creditors, their heirs, executors, administrators or assigns, be taken to be fraudulent, and clearly, absolutely, and utterly void.

Limitations for payment of just

The 4th section of the statute, however, contains

(n) *Jones v. Nabbe*, Gilb. 404.
Rep. in Eq. 146; S. C. by name of *Nab v. Nab*, 10 Mod. 14.
(o) Stat. 3 Will. & Mar. cap.

tains an exception; and provides that, any limitation, appointment, or devise of lands for payment of just debts, or any portion, or sum of money, for any child of any person, other than the heir at law, in pursuance of any written marriage-contract, *bond fide* made before such marriage, shall be of full force, and effectual for such estate or interest as shall be so limited, appointed, or devised. And, in order to prevent fraudulent alienations, by heirs at law, of lands descended to them; by the 5th sect. of the statute, it is enacted, that, where any heir at law shall be liable to pay the debts of his ancestor in regard of lands descending to him, and shall sell or make over the same before any action brought, or process sued out against him; such heir at law shall be answerable for such debts, to the value of the said lands so by him sold, aliened, or made over. The 7th section contains a similar provision against alienations by devisees, whereby just creditors might otherwise be defrauded.

debts; or of younger children's portions, in pursuance of contract before marriage, excepted out of the act.

The heir liable, though he alien the lands descended, before action brought:

the same provision applies to devisees.

In the construction of this act, it is clearly resolved, that, a devise for payment of debts creates equitable assets; and the division must be amongst all creditors, of every description, *pari passu* (p): and that, where the testator has directed such payment to be made out of the "rents and profits," (if no further words limiting the devise to *annual* profits be used,) the estate may be sold (q). It

A devise for payment of debts creates equitable assets:

Land may be sold, under a direction to pay out of "rent and profits."

has

(p) *Newton v. Bennet*, 1 Br. 137; *Clay v. Willis*, 1 Barn. & Cressw. 372.

by, 1 Br. 311; *Ridout v. Earl of Plymouth*, 2 Atk. 105; *Boottle v. Blundell*, 19 Ves. 528;

(q) *Lingard v. Earl of Derby*, 1 Br. 311; *Anonym.* 1 Vern. 104.

Trustees for payment of debts, may act without a decree of a Court of Equity.

has also been declared, that, the proviso in the 4th section of the act operates only by way of an exception, and does not give any new force to the law in this particular, but leaves it just as it stood before the act (*r*): and that, trustees for payment of debts need not wait for a decree of a Court of Equity for raising the money; but, without that, may fairly raise it by sale or mortgage; (unless where it is directed to be raised by a perception of rents and profits,) and the Court of Chancery, if the matter be afterwards brought before it, will support the transaction (*s*).

An illusive devise for payment of debts, not protected by the exception in the statute;

but if the devise can be made effectual, it will be supported; it is not necessary the descent should be actually broken; a charge will, in Equity, be sufficient.

Of course, a devise of lands for payment of debts, if made in a manner which would not answer the ostensible purpose, would be within all the mischief which the statute was intended to prevent; such a devise would, therefore, be deemed fraudulent, and not protected by the exception in the statute (*t*). But, wherever a provision by will, for payment of creditors, can be made effectual, either at Law or in Equity, such provision is not within the general scope of the statute. It is not necessary, therefore, that the descent of the estate should be broken; it is enough if it appear, upon the face of the will, that, the testator intended to break it. A mere charge is not, indeed, a legal interest, in such a case; it is not a *devise* to any one; but it is a declaration of intention, upon which a Court of Equity will fasten: and whether the de-

scent

(*r*) *Plunkett v. Penson*, 2 *Bradford*, 2 *Ves. Senr.* 590.
Atk. 292; *Lingard v. Earl of Derby*, *ubi suprâ*.
 (*t*) *Hughes v. Doulsen*, 2 *Br.* 614; *S. C.* (the judgment more fully reported) 2 *Cox*, 170.
 (*s*) *Earl of Bath v. Earl of*

scient be broken, or not, the charge will constitute equitable assets (u).

To a creditor's bill under the statute of fraudulent devises, the heir at law of the testator, (if he can be discovered (w),) is a necessary party (x): but the cause will not be stayed on account of the infancy of such heir; for the *parol* never demurs but where the estate comes to the heir by descent (y). And, it should seem, that, not only when the descent is broken by a devise, but, also, where the estate is merely charged for payment of debts; process will issue against the infant heir, as if he were of full age; and a receiver may be appointed, in order to prevent a failure of justice (z). But, in such cases, there must be a decree *nisi causa*, in the first instance, with leave for the infant to put in a new answer, and make a better defence, if he can, on coming of age (a): or previously thereto (b): for a decree against an infant defendant, relating to his inheritance, is never made absolute till six months after he has attained his full age (c). But an infant, it has been said, is as much bound, and as little privileged, when plaintiff, as one of full age (d). In another case, however, this *dictum*

To a creditor's bill, founded on this statute, the heir should be a party: the suit will not be stayed on account of his minority;

but, where that descent is not broken, a decree *nisi* alone will be made against him, in the first instance:

though the rights of an infant plaintiff are concluded by a decree in his favor; which, if he die, his representatives cannot disturb.

(u) *Bailey v. Ekins*, 7 Ves. 323; *Shiphard v. Lutwidge*, 8 Ves. 30.

(w) *Gawler v. Wade*, 1 P. Wms. 100.

(x) *Warren v. Stawell*, 2 Atk. 125.

(y) *Beaumont v. Thorp*, 1 Ves. Senr. 28.

(z) *Lee v. Turnbull*, 2 P. Wms. 409.

(a) *Fountain v. Caine*, 1 P. Wms. 503; *Napier v. Lady Effingham*, 2 P. Wms. 403.

(b) *Bennet v. Lee*, 2 Atk. 581; *Savage v. Carroll*, 1 Ba. & Beat. 553.

(c) *Napier v. Lady Effingham*, *ubi supra*; *Fountain v. Caine*, *ubi supra*.

(d) *Lord Brook v. Lord Hertford*, 2 P. Wms. 519;

was

was qualified, by an intimation that the rights of an infant plaintiff were bound by a decree made *in his favor*; and that, in case of his death, his representatives could not disturb that decree, though it should appear less favorable to their interests (*e*). When a submission is made in a bill brought in the name of an infant, the Court will be careful not to act upon that submission, if it ought not to have been made (*f*).

Though an appointment by a father, of a guardian to his children, must be attested by two witnesses; the appointment may be revoked by an instrument not attested:

Case of exception to this rule.

Express revocation of wills disposing of lands, must be executed according to the statute;

The rule of the civil Law, which required the same solemnity to annul an instrument that was necessary to its perfection, has not been adopted, to its full extent, in this country; for instance, the statute of the 12th of Charles 2, authorizing a father to appoint a guardian of his children, by deed, or will, requires such deed, or will, to be attested by two or more witnesses; but, this statute is silent as to the manner in which such an appointment may be revoked; a codicil, therefore, of which the sole object is a direct revocation of the appointment of a guardian, may effect that object, without being attested by two witnesses. The case would be different, where such revocation was only incidental to an ulterior object, which is not effected (*g*).

Revocations of wills disposing of lands, must be either express, in which case they must be executed according to the provisions of the statute of frauds; or implied, by operation of law, notwithstanding

Gregory v. Molesworth, 3 Atk. Wms. 387. See, *ante*, p. 76. 626.

(*g*) *Ex parte The Earl of Sheffield v. Duchess of Ilchester*, 7 Ves. 376. See *Buckinghamshire*, 1 Atk. 631. *post.*

(*f*) *Serle v. St. Eloy*, 2 P.

standing that statute and without reference to the intent of the testator (*h*). Thus, the least alteration, or new modelling, of the devised estate, subsequently to the will, operates as an actual revocation (*i*). And, if a deviser, after making his will, put the whole interest of the lands devised out of himself, by any conveyance whatsoever, it is a revocation; although he take back again the very same estate, immediately (*k*): or, although, without express limitation, it result to him (*l*). And a binding contract for the sale of lands devised, is, in Equity, as much a revocation, as a conveyance of the land would be at Law. The will, it should seem, would not be set up again, even by an abandonment of the contract in the testator's lifetime (*m*). but revocation will be implied, by operation of law, whenever, after the devise, the estate has been in any way new-modelled.

It must be recollected, however, that, if the owner of an unqualified equitable fee devise it by will, and afterwards take a conveyance of the unqualified legal fee, this is no revocation; because the conveyance was incidental to the equitable fee: just as a partition is no revocation, because incidental to a joint estate. But any qualified conveyance of the legal fee, however slight, would operate a revocation (*n*). A partition, as has just been intimated, A binding contract for sale of lands devised, though abandoned, works a revocation.

(*h*) *Cave v. Holford*, 3 Ves. 658; *Brydges v. Duke of Chandos*, 2 Ves. Jun. 430.

(*i*) *Sparrow v. Hardcastle*, 3 Atk. 802; *Williams v. Owens*, 2 Ves. Jun. 599.

(*k*) *Parsons v. Freeman*, 3 Atk. 747; *Vanser v. Jeffery*, 2 Swanst. 274.

(*l*) *Harwood v. Uglander*, 6

Ves. 222; *Cave v. Holford*, 3 Ves. 659.

(*m*) *Bennett v. Earl of Tankerville*, 19 Ves. 178.

(*n*) *Ward v. Moore*, 4 Mad. 372; *Rose v. Conynghame*, 11 Ves. 554; *Parsons v. Freeman*, 3 Atk. 749; *Knollys v. Alcock*, 7 Ves. 564.

But a devise of an equitable fee is not revoked by the subsequent acquisition of the legal fee:

Nor does mere partition work a revocation;

though an exchange does.

mated, does not revoke a will, where nothing has been done beyond mere partition: but the case of an exchange stands on different grounds; a partition may be enforced; an exchange is always a voluntary act; on partition the title remains the same; by exchange a new title is accepted. There is no inconsistency, therefore, in the decisions which have established, that, a bare partition is not a revocation of a previous devise; but that an exchange is (o).

Bequest of the equitable interest in personalty, not revoked by the testator's acquiring the legal interest.

As a devise of lands, in which the testator at the time of making his will had only an equitable estate, would not be revoked by his merely taking the legal estate in the same, without modification, and doing no more (p); so, *a fortiori*, merely taking a transfer of the legal interest in personalty, will not operate either as a revocation or ademption of a previous bequest, by a person who at the time had only the equitable interest therein (q).

Marriage, combined with the birth of children, may be a presumptive revocation of a previous will.

A total alteration in the circumstances and situation of a testator, has been held, *prima facie*, to imply a revocation; thus, where a single man, after devising his whole estate, marries and has issue; a revocation of the will has been presumed, (though such presumption may be rebutted,) where the deviser has left his widow and issue unprovided for (r). Both the principle and the practice apply

(o) *Attorney General v. Vigor*, 8 Ves. 281.

(p) *Ranlins v. Burgess*, 2 Ves. & Bea. 385; *Perry v. Phelps*, 1 Ves. Junr. 255.

(q) *Dingwell v. Askew*, 1 Cox, 427.

(r) *Kenebel v. Scrafton*, 2 East, 542; *Wilkinson v. Adam*, 1 Ves. & Bea. 465; *Moore v. Moore*, 1 Phillim. 433; *Wright v. Sarmuda*, 2 Phillim. 267, note.

ply equally in favor of a posthumous child (*s*). But, neither marriage alone, nor the birth of children alone, will, without other special circumstances, revoke a will (*t*). What shall be deemed a "total change in the situation of a testator's family," *may* be matter of controversy in any new case: but all the cases in which, hitherto, wills of *land* have been set aside upon this doctrine, have been very simple in their circumstances; and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them, the will has been that of a person who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been, to let in such after-born heir to take an estate, disposed of by a will made before his birth. The condition *implied* in those cases was, that, the testator, when he made his will in favor of a stranger, or more remote relation, intended that it should not operate, if he should have an heir of his own body. Of course there could be no room for the operation of such a condition, when the testator, at the date of his will, had children, of whom one was his heir apparent. In such case, to hold the will revoked as to the real estate, on account of the birth of children by a second marriage, would only have the effect of letting the eldest son into the whole (*u*). But, where

In what cases wills of land have been set aside upon this doctrine;

and where it cannot reasonably be allowed any operation:

Distinction where the will disposes of personality.

(*s*) *Doe v. Lancashire*, 5 T. 4 Mau. & Sel. 12. See, however, *post*, and *Johnston v. Johnston*, 1 Phillim. 467, 474.

(*t*) *Shepherd v. Shepherd*, 5 T. R. 52, note; *Doe v. Barford*, (u) *Sheath v. York*, 1 Ves.

a testator, after having made a provision by will for children by his then subsisting marriage, becomes a widower, and has a second family; the Ecclesiastical Court may, on reasonable grounds, declare the will revoked as to the personal estate, thereby letting in the after-born children with those of the first marriage (*w*); but, the principle of such a decision can have no bearing upon the devise of the real estate. As the disposition of property by will may be conditional and contingent, so may its re-

Revocation may be made dependent on a contingency.

vocation; or, rather, a will, or codicil, may be entirely dependent on a contingency, so as to have no effect, as a testamentary instrument, unless under the indicated contingent circumstances (*x*).

Enactments of the statute of frauds, as to revocations of devises of land:

Previously to the statute of frauds, wills might be revoked, by express words, without writing; but the 6th clause of that statute enacts, that, no devise of lands shall be revocable otherwise than by some other *will or codicil* in writing, or *other writing* declaring the same, by the testator himself, or in his presence, and by his direction and consent; but all devises and bequests of lands and tenements shall continue in force, until the same be burnt, cancelled, torn or obliterated by the testator, or by his direction in manner aforesaid; or unless the same be altered by some other *will or codicil* in writing, or *other writing* of the devisor,

& Bea. 397: and see *Ex parte The Earl of Ilchester*, 7 Ves. 366.

(*w*) *Hollway v. Clark*, 1 Phillim. 342; *Emerson v. Boyle*, 1 Phillim. 344: see, how-

ever, *Thompson v. Shepherd*, 2 Cox, 165, 168; *Johnston v. Johnston*, 1 Phillim. 472.

(*x*) *Parsons v. Lanoe*, 1 Ves. Senr. 190; *Sinclair v. Hone*, 6 Ves. 611.

devisor, signed in the presence of three witnesses declaring the same. This clause has been construed disjunctively; and it is settled, that, although three witnesses are required to attest and *subscribe* a revocation of a previous will, when such revocation is sought to be effected by a subsequent *will or codicil*; yet, if, by any *other writing*, the testator intend barely to revoke his will, without more, he may do this, effectually, by a writing signed in the presence of three witnesses, who need not subscribe their names in his presence, as they must to a will of real estate (y). For, however singular the difference between the 5th and 6th sections of the statute of frauds may appear; and though it be difficult to suppose the legislature *meant* to institute one mode of revocation, so nearly approaching, and yet not exactly conformable, to the mode of disposition prescribed; still, as it *has* specified what shall be sufficient to revoke; the enactment is conclusive. And there is certainly nothing repugnant to the common Law, in declaring, that, an act which might not be sufficient to give, shall be sufficient to revoke (z). But, where the revocation of a devise is attempted to be effected by an instrument purporting to be also a will, disposing of the property; if it be not duly executed, as such, within the 5th section of the statute of frauds, although such instrument contain express words of revocation, it will not let in the heir; for

No such revocation can be effected by a subsequent will or codicil, not subscribed by three witnesses:

but, if by any *other writing* (not a will or codicil) a bare revocation is declared, though three witnesses must be present when the testator signs his revocation, they need not themselves subscribe it.

The heir not let in, by an instrument purporting to be a will, and containing express words of revocation of a previous devise, if such instrument be not executed according to the fifth section of the statute of frauds:

(y) *Eccleston v. Speke*, Carthew, 81; *Hoil v. Clark*, 3 Mod. 220; *Grayson v. Atkinson*, 2 Ves. Senr. 458. (z) *Ex parte The Earl of Ilchester*, 7 Ves. 372; *Ellis v. Smith*, 1 Ves. Junr. 13.

the meaning of the second will, in such case, must be to give to the second devisee what it intends to take from the first, without any consideration had to the heir; and if the second devisee, owing to the defectiveness of the disposition in his favor, can take nothing, the first will lose nothing (*a*).

Distinction, as to revocation, whether the will is inoperative as not being duly executed; or only from the incapacity of the devisee to take.

The distinction, however, must be clearly kept in mind, between the effect, as to revocation, arising out of a will not duly executed; and that of a devise of lands void in respect of the incapacity of the devisee to take (*b*). Even a grant which, from the incompetency of the party in whose favor it was made, cannot take effect, may operate as a revocation of a previous will, disposing of the same subject (*c*). And, as it is the statute of frauds alone which prescribes certain forms as necessary to make an express revocation of a will of lands valid; and which declares, that, unless such instrument of revocation be complete, it shall be altogether inoperative; this doctrine is not extended to cases where the statute of frauds does not apply. Thus, although a feoffment of lands previously devised may fail, for want of due livery of seisin, yet, the intention of the feoffor being apparent, the devise will be revoked (*d*). The same observation holds as to a bargain and sale, which, though not enrolled before the testator's death,

The necessity of finally completing, (in order to render valid) an act intended in revocation of wills of land; only applies to cases within the mischief the statute intended to remedy.

(*a*) *Onions v. Tyrer*, 1 P. Wms. 345; *S. C.* Prec. in Cha. 460; *Eccleston v. Speke*, Carth. 80.

(*b*) *Roper v. Radcliffe*, 10 Mod. 233.

(*c*) *Beard v. Beard*, 3 Atk. 72.

(*d*) *Ex parte Earl of Ilchester*, 7 Ves. 370; *Beard v. Beard*, *ubi supra*.

death, is a revocation(*e*). So, if, after a devise; a man convey his estate by lease and release, to trustees, to the use of himself and his heirs until his marriage, and after his marriage to himself for life, with the usual remainders; though the party die before marriage, this conveyance will amount to a revocation(*f*). And a renewal of a lease, generally speaking, operates as a revocation(*g*); but the context of the will may, it seems, control this construction(*h*): thus, where a testator gives a lease, and all the term, estate, or interest which shall be to come therein, at the time of his decease; or, where he makes a reversionary bequest of all the term, estate, and interest, which shall be to come in leasehold property, at the decease of the first taker, expressly providing for the charges of renewal: in the first case, no republication would be necessary, upon a renewal by the testator in his lifetime; and in the other case, any renewals by the first taker would be coupled with a trust for the ulterior objects of the testator's bounty(*i*). The question, in these cases, turns upon

Generally, renewal of a lease revokes a devise of the leasehold interest; but the context of the will may control this construction.

(*e*) *Sparrow v. Hardcastle*, 420; *Cave v. Holford*, 3 Ves. 3 Atk. 803; *Vanser v. Jeffery*, 659.
2 Swanst. 274.

(*f*) *Earl of Lincoln's case*, P. Wms. 170; *Abney v. Miller*, 2 Atk. 597.

(*g*) *Marwood v. Turner*, 3 P. Wms. 170; *Abney v. Miller*, 2 Atk. 597.
(*h*) *James v. Dean*, 11 Ves. 390.

(*i*) *James v. Dean*, 15 Ves. 239; *Stirling v. Lidyard*, 3 Atk. 199; *Carte v. Carte*, Ridgeway, 222; *S. C.* 3 Atk. 176.
Goodtitle v. Otway, 7 T. R.

Effect, as to revocation, of a surrender of copyholds.

A conveyance merely as a security for money, only a revocation *pro tanto*.

A subsequent lease does not revoke, though it qualifies, a devise of the property:

but a lease to the devisee himself, not to commence till the death of the deviser, would be inconsistent with, and a revocation of, the devise:

upon the intention, to be collected from the language of the will (*k*). With respect to copyholds, a surrender to the uses of a marriage settlement will not revoke a surrender to the use of a will, and a devise of such copyholds (*l*).

If a conveyance, or recovery, be for a particular, limited, purpose; then neither of them revokes a previous devise of the estate conveyed, further than is necessary for that express purpose (*m*): supposing such purpose is only to give a security for a sum of money (*n*). Thus, if a person mortgage a devised estate, not only by lease and release, but, by fine; this, in Equity, will be only a revocation *pro tanto* (*o*): even a mortgage in fee to the de-

vissee does not revoke the devise (*p*). Upon the same principle, if a man, being seised in fee of a freehold, make his will; that will is not revoked by his afterwards granting a lease of his estate. The devisee takes the estate, subject to the lease (*q*).

The reason of the thing would be the same, although such lease were made to the devisee himself; for the deviser might naturally choose to reserve a rent during his lifetime: the case would be different, if the lease were made *to commence after the testator's death*; that would be a revocation

(*k*) *Slatter v. Noton*, 16 Ves. 201; *Colegrave v. Manby*, 6 Mad. 84.

(*l*) *Vawser v. Jeffery*, 3 Barn. & Ald. 470.

(*m*) *Parsons v. Freeman*, 3 Atk. 748.

(*n*) *Vawser v. Jeffery*, 2 Swanst. 273.

(*o*) *Casborne v. Scarfe*, 1 Atk. 606; *Rider v. Wager*, 2 P. Wms. 334.

(*p*) *Baxter v. Dyer*, 5 Ves. 664.

(*q*) *Lambe v. Parker*, 2 Freem. 284; *Roe v. Wegg*, 6 T. R. 710.

tion of the devise *in toto*; for the two dispositions would be altogether inconsistent (*r*). Where, however, a subsequent disposition of property is inconsistent with a previous devise; if there be but an inconsistency in part, it is a revocation as to that part only (*s*). And, a second will being no revocation of a former one, further than as it is inconsistent therewith; it will not be enough to prove that a second will was made, without producing it, and shewing it to be not merely different from, but incompatible with, the former. Otherwise, the fraudulent suppression of a second will, which was intended merely as a confirmation, might be made to operate as a revocation (*t*).

a partial inconsistency, however, only induces partial revocation:

and though it be proved that a party made a second will, yet, if its contents do not appear, it cannot revoke a former will.

As the bankrupt laws take the property of a bankrupt out of his hands only for the purpose of paying his creditors, a devise of real estate is not revoked by an act of bankruptcy, further than may be necessary for the payment of the demands of the testator; the surplus will remain well devised (*u*).

To what extent bankruptcy is a revocation.

It would be an untenable position to maintain, that, a deviser by making a second will, in terms large enough to include all his property; must, necessarily, have meant to revoke a former will: to have this effect it must be shewn, that, the disposition

A second will, though its terms may be large enough to include all a testator's property, not necessarily a revocation of a former will.

(*r*) *Coke v. Bullock*, Cro. Jac. 49; cited also in *Perkins v. Walker*, 1 Vern. 97, but omitting the most material circumstance,—the time when the lease was to commence: *Hodgkinson v. Wood*, Cro. Car. 24.

Cowper, 90; *S. C. in Dom. Proc.* 7 Br. P. C. 349, folio edit.

(*t*) *Hitchins v. Basset*, 3 Mod. 208, affirmed in *Dom Proc. Show.* P. C. 149.

(*u*) *Charman v. Charman*, 14

(*s*) *Harwood v. Goodright*, Ves. 584.

sition of the property made by the two wills is inconsistent. It would be an assumption, of what is not a necessary inference, to say, that, by his second will, the testator must have intended either to confirm, or revoke, the dispositions contained in the first will: there is a third proposition—he might not have contemplated to do either, but to make a mere collateral disposition of the property (*w*). And as, before the statute of frauds, parol declarations of an intention to revoke by a future act, would not have amounted to a present revocation (*x*); so, the same sense conveyed, now, in writing will have no further operation, than such a parol declaration would have had before the statute (*y*).

A declared intention to revoke by a future act, no present revocation.

But where a codicil expressly revokes the previous devise, the disposition must depend on the codicil alone.

But, where a testator has by a codicil expressly revoked the whole of a previous devise, and has taken upon himself to declare over again all the trusts; it is in his new disposition alone that the testamentary title to his property must be sought. There may be strong ground for supposing, that, it was by a mere slip he omitted to dispose of part by the codicil, as he had done by his will; but this omission a Court of Equity cannot supply (*z*).

Effect of a codicil, added only for a particular purpose.

A codicil, however, added merely for a particular purpose, (such, for instance, as changing an executor, but confirming the will in all other respects,) will not have the effect of setting up again a part of the will, revoked by a former codicil (*a*).

A conveyance,

(*w*) *Thomas v. Evans*, 2 *suprà*.
East, 494.

(*z*) *Holder v. Howell*, 8 Ves.

(*x*) *Cranvel v. Sanders*, Cro. 108.
Jac. 497.

(*a*) *Crosbie v. M'Doual*, 4

(*y*) *Thomas v. Evans*, *ubi* Ves. 616.

A conveyance, or other instrument, obtained by such fraud and covin as would render it a nullity even at common Law, cannot, of course, revoke a will (b); but, in what cases a deed, though liable to be impeached in Equity, and ordered to be delivered up as improperly obtained, may, notwithstanding, operate a revocation, is, perhaps, hardly yet settled. Where the party executing thought, that, by such conveyance his will was revoked; and where a reconveyance would be necessary to remedy the fraud; Lord Alvanley was of opinion, that, the impeached instrument, though set aside and made ineffectual for other purposes, would still be a revocation (c). Lord Thurlow thought differently (d); but Lord Eldon seems to have inclined in favor of Lord Alvanley's doctrine (e).

Quare, whether an instrument, though impeached in Equity, and ordered to be delivered up, may not operate as a revocation?

Where an instrument revoking legacies bears upon the face of it evidence, that, it was entirely grounded upon misinformation or mistake, the bequests made by the will remain good (f). But, where a testator assigns, as a reason for his revocation, not only doubts whether the objects of his once intended bounty are alive, but, also whether, they may not, even if living, be well provided for; a revocation grounded on this double uncertainty must take effect; and a Court of Equity will not inquire

Where an instrument revoking legacies is, on the face of it, grounded on mistake, it will have no effect in Equity: but where a doubt is assigned as a reason for revocation, there can be no inquiry whether that doubt was well founded or not.

(b) *Hicks v. Morse*, Amb. 215.

(c) *Hawes v. Wyatt*, 2 Cox, 268; S. C. 3 Br. 157; *Harwood v. Oglander*, 6 Ves. 215; *Ex parte The Earl of Ilchester*, 7 Ves. 374.

(d) See the cases cited in the last note.

(e) *Attorney General v. Vigor*, 8 Ves. 283.

(f) *Campbell v. French*, 3 Ves. 323.

inquire whether the legatees are, or are not, well provided for (*g*): the testator will be understood to have determined to quiet his own doubts, and to settle them himself on some certain foundation; not leaving them to be litigated after his death (*h*).

And where a testator prescribes a particular mode of proof of a legatee's existence, no other mode of proof will avail.

So, although there may be cases in which, notwithstanding a condition prescribes the means, yet, the end being obtained, the means may be overlooked; still, this rule of the civil Law can never govern a case, in which a testator has prescribed particular means of proving the existence of a legatee, as an express condition, upon which alone he is to be entitled to the legacy; and with a direction, that, if such proof be not given within a limited time, the legacy shall sink into the residue. In this case, if the particular mode of proof prescribed be not given, the legacy cannot be claimed, although the existence of the legatee may, by other means, appear (*i*).

Though a testamentary instrument be lost, its substance may be established.

There can be no doubt, that, the contents or substance of a testamentary instrument may be established, though the instrument itself cannot be produced, upon satisfactory proof being given that it was duly made by the testator, and was not revoked by him: for example, either by shewing that the instrument existed after the testator's death; or that it was destroyed in his lifetime without his privity or consent (*k*). It is also well settled, that, in legal consideration, a will may be cancelled without

(*g*) *Attorney General v. Ward*, 3 Ves. 331.

(*h*) *Attorney General v. Lloyd*, 3 Atk. 552.

(*i*) *Tulk v. Houlditch*, 1 Ves. & Bea. 259.

(*k*) *Davis v. Davis*, 2 Ad-dams, 224.

out being revoked. The cancelling is an equivocal act, and in order to operate as a revocation must be done *animo revocandi* (l). Thus, cancelling a former will, on a presumption that a latter, devising the same lands to the same uses, was effective, would be no revocation of the former, if the latter proved to be void (m). But, although the cancellation of a will does not *necessarily* infer any intentional abandonment of the dispositions contained in, or, consequently, any revocation of it; yet, this is the *ordinary* inference. And, in order to bar its application to any particular case of cancelling, two things at least are requisite; first, it must be proved, that, the cancelled paper once existed as a *finished* will; secondly, it must be clearly shewn, that, the testator adhered to it throughout, in mind and intention, notwithstanding its cancellation (n): restricting, however, this latter *dictum*, to a certain extent, by the qualification established in *Onions v. Tyrer*, in cases where a substituted will proves inoperative.

A will though cancelled is not revoked, unless the act was done *animo cancellandi*:

but the cancelled instrument must be shewn to have once existed as a finished will; and it must, also, be proved, that the testator's mind adhered to the substance of the disposition made thereby.

Where a testator has executed duplicates of his will, and retained one part only in his own possession; if he destroyed that part, the legal presumption would be, that, he intended to revoke his will altogether; and the duplicates in the possession of others would not avail (o). If the testator himself had possession of both parts, the same presumption

When duplicates of a will are executed, how far the destruction of one part affords a presumption of an intent to revoke the whole.

(l) *Burtonshaw v. Gilbert*, Cowp. 52; *Johnston v. Johnston*, 1 Phillim. 466.

(n) *Lord John Thynne v. Stanhope*, 1 Addams, 54.

(m) *Onions v. Tyrer*, 3 P. Wms. 345.

(o) *Sir Edward Seymour's case*, cited 3 P. Wms. 345.

Whether the destruction of a second will revoking a former, sets up again the first will, depends on circumstances.

Partial obliteration revokes only *pro tanto*: But, obliteration of a codicil may cancel an interlineation in the will.

And cancellation of a will, generally, revokes a codicil.

sumption would hold, though weaker. And, even if, having both in his possession, he *altered one*, and then destroyed *that which he had altered*, there also the presumption of intended revocation would exist; but still weaker, and more capable of being rebutted (*p*). Lord Mansfield held it settled, that, if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived (*q*): considerable doubt, however, has been, judicially, expressed on this head; and it rather seems, that, it must be considered as a question of intention, to be decided according to the circumstances of each particular case (*r*).

The obliteration of part of a will operates as a revocation only *pro tanto* (*s*). But, the obliteration of a codicil may have the effect of cancelling an interlineation in a will, if it appear clearly, that, the codicil and the interlineation had the same object in view; and, that, the testator, by obliterating the codicil, intended to renounce that object, and not merely the *mode* of effecting it (*t*). And, as a codicil is, *prima facie*, dependent on the will, cancellation of the will is, generally, an implied revocation of the codicil: there have, indeed, been cases, where a codicil has appeared so independent of,

(*p*) *Pemberton v. Pemberton*, 13 Ves. 310.

(*q*) *Harmood v. Goodright*, Cowp. 91.

(*r*) *Moore v. Metcalf*, 1 Phillim. 400; and, on appeal before the Court of Delegates, *ibid.* 419; *Hooton v. Head*, 3

Phillim. 32; *Usticke v. Bawden*, 2 Addams, 125.

(*s*) *Larkins v. Larkins*, 3 Bos. & Pull. 21; *Short v. Smith*, 4 East, 429.

(*t*) *Uttersen v. Uttersen*, 3 Ves. & Bea. 123.

of, and unconnected with the will, that, under circumstances, the codicil has been established, though the will has been held invalid. Such cases have turned upon clear intention, repelling the legal presumption, and shewing that the testator designed to leave the codicil operative, notwithstanding the revocation of the will (u).

Where a power of disposition is exercised by a testamentary instrument, such an instrument is, from its very nature, revocable up to the death of the party executing it; and that without any fresh power of revocation reserved in the first testamentary instrument; which reservation would have been necessary in the case of a deed (w).

When powers of disposition are to be executed by will, such will may be revoked, *toties quoties*, without reserving fresh power of revocation.

As, in Equity, an estate contracted for by, but not actually conveyed to, a testator, will pass under a general devise of his estates (x); the converse equally holds: therefore, although a covenant, or articles, for conveyance of a devised estate, do not at common Law revoke a will, yet, if entered into for a valuable consideration, they would, in a Court of Equity, amount to a conveyance; and, consequently, be an equitable revocation of a will, or of any writing in the nature thereof (y).

In Equity, an estate contracted for by a testator, passes under a devise of his estates; whilst his agreement to convey a devised estate, is an equitable revocation of the devise:

For, every devise of real estate is *specific* (z); and, being

no man can devise land which

(u) *Medlycott v. Assheton*, 2 Addams, 231.

Oke v. Heath, 1 Ves. Senr. 139.

(w) *Hatcher v. Curtis*, 2 Freem. 61; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Senr. 77; *Reid v. Shergold*, 10 Ves. 379; *Hobson v. Blackburn*, 1 Addams, 278;

(x) *Capel v. Girdler*, 9 Ves. 510; *Broome v. Monck*, 10 Ves. 605.

(y) *Cotter v. Layer*, 2 P. Wms. 624; *Attorney General v. Vigor*, 8 Ves. 289.

(z) *Hill v. Cock*, 1 Ves. &

he had not both at the date of his will, and of his death:

though it is possible for the estate to have been divested in the intervening time, and yet for the will to stand good, without republication:

and though a testator was disseised at the time he made his will, yet, if he be remitted before his death, the devise should seem to be good.

being considered in the nature of an appointment of particular lands to a particular devisee, it is a necessary consequence of this principle, that, no man can legally devise lands, to which he has not a legal title at the date of the appointment, and of his death; nor can such a devise be held good in Equity where the equitable title was not in the deviser at both those periods (*a*). The estate may, indeed, during the intervening time have been divested, and yet the will may, without republication, stand good. Thus, if a deviser, seised in fee at the time of the devise, be disseised, but afterwards purge the disseisin by re-entry; the estate will not merely be revested, but, in consideration of Law, the disseisee will be held to have been in possession from the time of disseisin, by relation; and, as a necessary corollary, his will, disposing of that property, will need no republication to render it valid (*b*). And though if a testator devise lands of which he is at the time actually disseised, the will cannot pass the lands, if the deviser die before he is remitted by entry thereupon; yet, if he do enter, after he has made his will, and if it be sound law, (as seems established by the cases cited,) that, such entry has relation, to all intents and purposes, to the time of the disseisin; then, such will, notwithstanding

Bea. 175; *Milnes v. Slater*, 8 Ves. 305.

(*a*) *Harwood v. Goodright*, Cowp. 90; *Hove v. Earl Dartmouth*, 7 Ves. 147; *Rose v. Conynghame*, 11 Ves. 554;

Brudenell v. Boughton, 2 Atk. 272.

(*b*) *Goodtitle v. Otway*, 1 Bos. & Pull. 603; citing the leading case of *Brunker v. Cook*, 11 Mod. 128.

withstanding it was executed when the deviser had only *jus ad rem*, not *in re*, will operate as a good devise (c).

But, if a mortgagee in fee devise all his lands, the mortgaged lands will not pass, unless the equity of redemption has been foreclosed, previously to the execution of the will; a subsequent foreclosure would be a new purchase of the lands, and, therefore, upon the principles already stated, the will could not, by anticipation, dispose of them (d).

A devise by a mortgagee of all his lands, will not pass the mortgaged lands: and a subsequent foreclosure would be a new purchase.

With respect to copyholds, however, as they are considered parcel of the manor of which they are holden, if the manor itself be well devised, copyhold premises purchased by, or which come by escheat to, the lord, subsequently to the execution of his will, pass thereunder: for the will operated on the whole manor, of which all the copyholds are part. The case may be illustrated by supposing, that, the lord has been seised of the manor *ex parte maternâ*, in which case, any newly acquired copyhold, purchased by him, would not descend, if he died intestate, to his heirs *ex parte paternâ* (e).

But copyholds which accrue to the lord, after a valid devise of the manor itself, pass as parcel thereof: and follow the descent of the manor if the lord die intestate.

It is clearly settled, that, a codicil to a will republishes that will; and, also, that, the republication of a former will supersedes one of later date, and reestablishes the first. Even a codicil of personality, if executed so as to act on the subject, that is, if attested by three witnesses, republishes a

A codicil to a will republishes that will; and republication of a former will supersedes one of later date, if no error or fraud be shewn.

will

(c) *Attorney General v. Vigor*, 8 Ves. 282.

post, as to mortgages of Leasehold premises.

(d) *Casborne v. Scarfe*, 1 Atk. 606; *Arthur v. Bockenham*, Fitz-Gibbon, 240: see,

(e) *Roe v. Wegg*, 6 T. R. 710; *St. Paul v. Lord Dudley & Ward*, 15 Ves. 172.

will of lands. No evidence of intention to republish is requisite; the very act of making the codicil, *prima facie* at least, infers the intention. It is true, indeed, that, this *prima facie* inference may be rebutted, by proof that the act was done by the deceased in error, or obtained from him by fraud (*f*): and, we shall see, shortly, that the rule does not extend to setting up again a lapsed, adeemed, or satisfied legacy.

A specific legacy, in its nature, is liable to ademption; and if the thing so given be once gone, there is an end to the claim of the legatee:

or there would be no distinction between a specific, and a mere pecuniary legacy:

The criterion of a specific legacy is, that, it is liable to ademption; that, when the thing bequeathed is once gone, it is lost to the legatee (*g*). If, therefore, a testator bequeath a legacy of certain stock in the public funds, or of a particular debt, so described as to render the bequest, in either case, specific; if that stock should be afterwards sold out by the testator, or if that debt should, in his lifetime, be paid or cancelled, the legacy would be adeemed (*h*). The question, in such cases, does not turn on the intention of the testator. The idea of proceeding on the *animus adimendi* (though supported by plausible reasoning) was found to introduce a degree of confusion into the decisions on the subject, and to afford no precise rule (*i*). It seems, therefore, now established, that, the principle of ademption, whenever the testator

(*f*) *Rogers v. Pittis*, 1 Ad-dams, 37; *Barnes v. Crome*, 1 Ves. Junr. 497; *Hulme v. Heygate*, 1 Meriv. 294; *Goodtitle v. Meredith*, 2 Mau. & Sel. 14; *Pigott v. Waller*, 7 Ves. 124.

(*g*) *Parrot v. Worsfold*, 1 Jac. & Walk. 601.

(*h*) *Ashburner v. M'Guire*, 2 Br. 109.

(*i*) *Stanley v. Potter*, 2 Cox, 182; *Humphreys v. Humphreys*, *ibid.* 185.

tator has himself received, or otherwise disposed of, the thing given, is, that, such thing no longer exists: for if, after a particular debt given by will had been received by the testator, it could be demanded by the legatee, that would be converting it into a pecuniary, instead of a specific, legacy (*k*).

Where, indeed, the identical *corpus* is not given (*l*), where the legacy is not specific, but what is termed in the civil Law a demonstrative legacy; that is, a general pecuniary legacy, with a particular security pointed out, as a convenient mode of payment; there, although such security may be called in, or fail, the legacy will not be adeemed (*m*). But, when it is once settled, that a legacy is specific, the only safe and clear way is to adhere to the plain rule,—that there is an end of a specific gift, if the specific thing do not exist at the testator's death (*n*).

but where the *corpus* is not given, there, though the security be called in, a demonstrative legacy is not adeemed.

If a testator bequeath a sum of stock “standing in his name,” this is a specific bequest (*o*); as it would be if he gave part of “his” stock, provided he had the stock described, when he made his will (*p*): and any act of his, destroying that subject, would be held to prove an intention to revoke the gift. So, if it appear, on reference to the Master,

What description renders a bequest of stock specific.

(*k*) *Fryer v. Morris*, 9 Ves. 368; *Barker v. Rayner*, 5 Mad. 217. *cock, ibid.* 159; *Le Grice v. Finch*, 3 Meriv. 52.

(*l*) *Selwood v. Mildmay*, 3 Ves. 310. (*n*) *Barker v. Rayner*, 5 Mad. 217.

(*m*) *Guillaume v. Adderley*, 15 Ves. 389; *Sibley v. Perry*, 7 Ves. 529; *Kirby v. Potter*, 4 Ves. 751; *Roberts v. Po-*

(*o*) *Alford v. Green*, 5 Mad. 95.

(*p*) *Selwood v. Mildmay*, 3 Ves. 310.

A mere misdescription of stock will not defeat an intended bequest thereof.

ter, that, the testator, at the time of making his will, neither had such stock as that specified, nor any other stock which he intended to pass by that description; but, that, he intended to buy such stock, though he never did so in fact; the legacy fails (*q*). A mere misdescription, however, will not defeat a bequest of this kind; for instance, if a testator give by the description of "long annuities then standing in his name," and die possessed of no other stock than "reduced annuities," parol evidence is admissible to shew, that, he had not, when he made his will, any "long annuities," strictly so called; and the *reduced* annuities, if the mistake be clearly made out, will pass (*r*). And, if a testator give, by his will, stock "standing in his name," when he has no stock actually standing in his name, but the stock to which he was entitled was standing in the names of trustees; such trust-stock will pass (*s*).

The same legacy may be specific in one sense, pecuniary in another.

The same legacy may be specific in one sense, and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of a definite sum of money, and not amounting to a gift of the fund itself, or any aliquot part of it (*t*). So, it has been said, a legacy may be clearly specific, if it can be specifically satisfied; yet be construed as a general pecuniary legacy, if it cannot (*u*). When the construction

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| (<i>q</i>) <i>Evans v. Tripp</i> , 6 Mad. 91. | <i>Ves. & Bea.</i> 5; <i>Roberts v. Pocock</i> , 4 Ves. 160; <i>Coleman v. Coleman</i> , 2 Ves. Junr. 640. |
| (<i>r</i>) <i>Penticost v. Ley</i> , 2 Jac. & Walk. 210. See <i>post</i> . | (<i>u</i>) <i>Fontaine v. Tyler</i> , 9 Price, 104: but see <i>Simmons v. Vallance</i> , 4 Br. 347. |
| (<i>s</i>) <i>Hewson v. Reed</i> , 5 Mad. 451. | |
| (<i>t</i>) <i>Smith v. Fitzgerald</i> , 3 | |

construction is at all doubtful, the inclination of the Court is strongly against holding a legacy to be specific (*v*). A specific legacy passes, together with its proceeds, from the death of the testator (*w*). Leaning against specific legacies.

If a father give his daughter a portion by will, and afterwards give the same daughter a portion in marriage, this, by the laws of all other nations as well as by those of Great Britain, is a revocation of the portion given by the will; it will not be intended, unless proved, that, the father designed two portions for one child (*x*). For, it has been reasonably presumed, that, a man does not mean to pay twice the same debt; and Judges in Equity have been in the habit (whether with strict attention to accuracy may be questioned,) of giving the name of *debt* to a portion, given by a father to a child (*y*). Where, indeed, a father is, even in the strict sense of the word, indebted to a daughter, there are very few cases in which he will not be presumed to have paid that debt, when, *in his lifetime*, he gives her in marriage a greater sum than he owed her; for, it is unnatural to suppose, that, he would choose to leave himself a debtor to her, and subject to an account (*z*). But, a debt due by a father to a child, it has been said, would A portion given on marriage, revokes a portion previously given by will:

For, a portion is considered as a debt, which it will not be presumed a man intends to pay twice.

Even a debt, in the strict sense of that word, will generally be taken to be so satisfied.

Whether, if the portion were not given by the pa-

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| <p>(<i>v</i>) <i>Chaworth v. Beech</i>, 4 Ves. 565; <i>Innes v. Johnson</i>, 4 Ves. 574; <i>Kirby v. Potter</i>, 4 Ves. 752.</p> <p>(<i>w</i>) <i>S. C.</i> p. 751; <i>Raven v. Waite</i>, 1 Swanst. 557.</p> <p>(<i>x</i>) <i>Hartop v. Whitmore</i>, 1 P. Wms. 681; <i>Ellison v. Cook-</i></p> | <p><i>son</i>, 1 Ves. Junr. 108.</p> <p>(<i>y</i>) <i>Wetherby v. Dixon</i>, 19 Ves. 411; <i>Ex parte Pye</i>, 18 Ves. 154; <i>Grave v. Lord Salisbury</i>, 1 Br. 426.</p> <p>(<i>z</i>) <i>Chave v. Farrant</i>, 18 Ves. 10; citing <i>Wood v. Bryant</i>, 2 Atk. 522.</p> |
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rent in his lifetime, but by will, the debt would be satisfied; would be a question of intention.

Peculiarities of the case of *Tolson v. Collins*.

Primâ facie, a legacy, equal to the amount of a debt due from the testator, adeems the debt:

but where a reasonable inference

no more be satisfied by a legacy given by the will of the father, than a similar debt due from a stranger would be satisfied by a legacy under his will; unless upon the face of the will, or from the circumstances and manner in which the testator acted upon the property, it can be plainly proved he meant his bequest to be in discharge of his debt (a).

The report of the case just referred to is, perhaps, less clear than might be wished: the legacy in question was given upon a contingency, and also raised a case of election; under these circumstances it would have been difficult to hold the legacy (whether given by a father or a stranger,) a conclusive satisfaction of a debt. But, from the general expressions used in the passage cited, without notice of the peculiarities upon which the case turned, it might be incautiously inferred, that, Lord Alvanley meant to intimate, as an unqualified proposition, that a debt due from a stranger was not, *primâ facie*, satisfied by a legacy of equal amount: a *dictum* which, so misunderstood, would stand opposed to the whole current of authorities, by which it is established, that, the *primâ facie* presumption, as applied to the will of a stranger, is on the other side; that, the general rule of ademption, where a legacy either exceeds the debt, or is equal to it, cannot now be disputed; and, that, where there is a debt due in the testator's lifetime, and nothing but a plain general legacy given to the creditor; this must be taken as a satisfaction of the debt (b). The reasonableness of

this

(a) *Tolson v. Collins*, 4 Ves. 491.

(b) *Richardson v. Greese*, 3 Atk. 67; *Reech v. Kennegal*,

this rule has, indeed, been questioned (*c*); it has even been called (and that by the learned Judge last named,) a "very absurd" rule (*d*); a rule which, "of all others that have been adopted by Courts of Equity, is most to be regretted (*e*):" but still, in the very cases which called forth this disapprobation, the doctrine was considered as too firmly established to be now shaken. It is no doubt true, that, where there are circumstances affording a fair inference, that, it was not the testator's intention the legacy should be an ademption of the debt, the leaning of Courts of Equity has been against the general rule (*f*); when applied to positive debts, it has been scrutinized very strictly (*g*), and any little circumstances are laid hold of to take a case out of the rule (*h*): but then, it was said, by Lord Hardwicke, these distinctions are not to be taken from circumstances *dehors* the will, if they are not to be deduced from the will itself (*i*). Lord Eldon, however, unwillingly, and after great deliberation, held himself bound by the preponderance of modern authorities, to admit parol evidence to repel the presumption, that, a debt was satisfied by a legacy of greater amount (*k*); notwithstanding the will itself afforded

arises, that such was not the intention, Equity leans against the general rule:

Parol evidence admitted, to prove the intention in such cases;

1 Ves. Senr. 126; *Jeffs v. Atk.* 301.

Wood, 2 P. Wms. 131; *Fowler v. Fowler*, 3 P. Wms. 353. (*g*) *Barclay v. Wainwright*, *ubi supra*.

(*c*) Case last cited, and *Chancey's case*, 1 P. Wms. 410. (*h*) *Hinchcliffe v. Hinchcliffe*, *ubi supra*.

(*d*) *Barclay v. Wainwright*, 3 Ves. 466. (*i*) *Richardson v. Greese*, 3 Atk. 68.

(*e*) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529. (*k*) *Wallace v. Pomfret*, 11 Ves. 548.

(*f*) *Nicholls v. Judson*, 2

such evidence
being admitted
as to portions.

A contingent
legacy can never
satisfy a debt.

Quere, how-
ever, whether in
some cases a be-
quest of a *resi-*
due may not satis-
fy a portion?

though no satis-
faction of a posi-
tive debt.

forred an inference in support of that presumption: this must, therefore, be now looked upon as settled. His Lordship relied on the analogous rule with respect to *portions*; an analogy which, (although it does not hold in all particulars; debts, in many cases, receiving a very different consideration;) there could be no sound principle for refusing to extend, in this instance, to the claims of debtors, after it was established in favor of portioners (*l*).

If a debtor, without noticing the debt, devise to his creditor an interest subject to a contingency: there, although the contingency should actually happen, yet the benefit received under the will would not go in satisfaction of the debt: because it is a maxim, that, a debt, which is certain, shall not be merged, or lost, by an uncertain, or contingent, recompence (*m*). It may be questionable, however, whether Lord Rosslyn did not give too extensive an application to this maxim, when he held, that, a gift of a residue could never be considered as a satisfaction of a portion (*n*). Lord Thurlow (*o*), as well as Mr. Justice Buller (*p*), came to a different conclusion: and with their opinion that of Sir Wm. Grant (*q*) seems to have coincided. With respect to a positive debt (*r*), indeed, or a provision for a wife, under a covenant in

(*l*) *S. C. ibid.* p. 547; *Druce v. Dennison*, 6 Ves. 398.

(*m*) *Talbot v. Duke of Shrewsbury*, Prec. in Cha. 395; *Clark v. Sewell*, 3 Atk. 98; *Spinks v. Robins*, 2 Atk. 493.

(*n*) *Freemantle v. Bankes*, 5 Ves. 85.

(*o*) *Rickman v. Morgan*, 1 Br. 67, 2 Br. 394.

(*p*) *Pearson v. Morgan*, 2 Br. 388.

(*q*) *Bengough v. Walker*, 15 Ves. 514.

(*r*) *Barret v. Beckford*, 1 Ves. Senr. 520.

in a marriage settlement (*s*); it appears to be better settled, that, a bequest of an uncertain residue cannot be deemed a satisfaction, even *pro tanto*. And, of course, a bequest of a residue *for life* only, cannot be construed a satisfaction for an *absolute interest* to which the residuary legatee is entitled, by way of portion, under a settlement (*t*). Nor will a devise of land be construed to be a satisfaction for a debt of money (*u*): and, (though this resolution, also, has been quarrelled with, as a strange one (*w*);) it is fully settled, that, a legacy which, in the smallest degree, falls short of a debt, will not be deemed a satisfaction *pro tanto* (*x*): neither, if a man first give a legacy by will, and afterwards a different sum to the same person by bond, will the one be a satisfaction for the other (*y*): for, a legacy cannot be deemed a satisfaction for services done to, or a debt incurred by, a testator, after the date of the will (*z*). A legacy bequeathed by the drawer to the payee of a negotiable security can never operate as an extinguishment; for, if it ever did so, the decision of each case must depend, not upon the intent, but, upon the fact whether the original payee had, or had not, negotiated the security before the date of the will (*a*).

A bequest of a residue for life, no satisfaction of an absolute interest due by way of portion.

A devise of land no satisfaction for a debt of money: nor a legacy less than the debt an *ademption pro tanto*: for satisfaction of a debt is not willingly presumed.

A legacy to the payee of a negotiable security, operates no extinguishment.

We

(*s*) *Devese v. Pontet*, 1 Cox, 192. *ham*, 2 Ves. Senr. 263; *Atkinson v. Webb*, 2 Vern. 478;

(*t*) *Alleyn v. Alleyn*, 2 Ves. Senr. 38. *Byde v. Byde*, 1 Cox, 48.

(*u*) *Eastwood v. Vincke*, 2 P. 492. (*y*) *Spinks v. Robins*, 2 Atk.

Wms. 616; *Bellasis v. Uthwaite*, 1 Atk. 428. (*z*) *Chancey's case*, 1 P. Wms. 409; *Thomas v. Bennet*,

(*w*) *Chancey's case*, 1 P. Wms. 410. 2 P. Wms. 342; *Fowler v. Fowler*, 3 P. Wms. 354.

(*x*) *Eastwood v. Vincke*, 2 P. Wms. 616; *Graham v. Gra-* (*a*) *Carr v. Eastabrooke*, 3 Ves. 564.

Whether a portion, like a debt, can only be satisfied by something *ejusdem generis*?

The case of *Grave v. Lord Salisbury* analysed.

The word "portion" properly applied only to a provision made by a parent, or one distinctly *in loco parentis*.

A legacy given by the will of a stranger not adeemed by a gift in his lifetime; unless an intent to that effect be clearly proved.

This rule may, in some cases,

We have just seen, that, a pecuniary debt will not be satisfied by a bequest of land, or *vice versa*; and the same rule, it has been said, holds with respect to portions; it may be worth consideration, however, whether the case generally relied on (b) goes the full length of supporting this proposition. In "*Grave v. Lord Salisbury*," the legatee was, indeed, suggested to have been the illegitimate son of the testator, but no proof was given that *Lord Salisbury* had distinctly put himself *in loco parentis*, or that the benefits conferred on the legatee, by his lordship, during his lifetime, were advanced as a portion. It would have been difficult, therefore, to hold, that, a testamentary gift by one who, in legal contemplation, was a stranger, should be adeemed by any gift, in such stranger's lifetime; more especially, perhaps, of a thing *non ejusdem generis* (c); though it may be doubted whether that circumstance was essential. For, the word *portion* is properly applied only in the case of a parent, legally acknowledged as such; or in the case of one who has clearly put himself *in loco parentis*; it is not applicable to the gifts of other relations, or friends. A legacy given by the will of a stranger, is not adeemed by the gift of a sum of money in the stranger's lifetime, unless there be evidence that the latter gift was intended for the same purpose as the former; and, that, at the time of the gift, it was meant to be an ademption of the legacy (d). This rule may, certainly, have

(b) *Grave v. Lord Salisbury*, Ves. 512.
1 Br. 425.

(c) *Bengough v. Walker*, 15 517.

(d) *Powell v. Cleaver*, 2 Br.

have the effect, in some instances, of placing illegitimate offspring in a more advantageous situation than legitimate children (*e*); but the evil, though admitted, is a necessary consequence flowing from doctrines, which, upon the whole, are salutary; which are now firmly established; and which could not be departed from, without creating greater mischief than the partial inconvenience they may, occasionally, produce.

give to illegitimate, advantages over legitimate, offspring.

Upon strict abstract principle, there may seem no reason why every gift should not be substantive, where the contrary is not expressed: in the case of parent and child a different rule prevails; a presumption, liable to be rebutted by parol evidence, is raised against the claim to, what is called, a double portion (*f*). And, to raise this presumption, no declaration seems necessary: but, if the parent do actually make any declarations, (even verbal ones,) as to the purpose, for which his advances were made, such declarations may, with due caution, be weighed (*g*); to examine whether they afford evidence, that, the two provisions were made *diverso intuitu* (*h*).

Established doctrine raises a presumption against a child's claim to a double portion:

This presumption may be rebutted by parol evidence; but, to raise it, no declaration is necessary.

So, although it be a settled rule, that, *simpliciter et primâ facie*, two different instruments giving legacies, whether of the same or larger amount, shall

Primâ facie, gifts by two different testamentary instruments are accumulative; but this presumption may be rebutted.

(*e*) *Wetherby v. Dixon*, 19 Ves. 412; *Ex parte Pye*, 18 Ves. 151.

(*f*) *Trimmer v. Bayne*, 7 Ves. 515; *Osborne v. Duke of Leeds*, 5 Ves. 381; *Ellison v. Cookson*, 3 Br. 62.

(*g*) *Robinson v. Whitley*, 9 Ves. 579; *Debeze v. Man*, 1 Cox, 351; *Dwyer v. Lysaght*, 2 Ball & Beat. 162.

(*h*) *Powell v. Cleaver*, 2 Br. 517; *Monck v. Lord Monck*, 1 Ball & Beat. 303.

As may the contrary presumption, *against* a double gift:

in such case, parol proof is received, not to contradict, but, to corroborate the will.

shall be held accumulative, and not a substitution; this is no more than a *prima facie* presumption, liable to be rebutted, by inference collected from the wording of the testamentary instruments (i). And, where the rules of Courts of Equity raise a presumption of a contrary kind; that is, *against* the intention of a double gift, by reason that the sums and the motives are the same in both instruments; there, *parol* evidence will be received, to shew, that the testator actually intended the double gift he has expressed (k). For, although parol proofs are not to be admitted in contradiction of the will, yet, when they go only in confirmation and corroboration of what appears to be the testator's intent by his written will, there, such parol evidence may be admitted to fortify it (l).

A gift by a codicillary paper is accumulative; but a gift by an instrument intended as the inception of a new will is not.

It was said, on a recent occasion in the Prerogative Court of Canterbury, that, there would seldom be much question in other Courts about accumulative legacies, if the principle established in that Court were rightly understood (m). The principle, as laid down by Sir John Nicholl, is, that, where a paper is codicillary, a legacy given thereby is accumulative to one given to the same person by the will, to which such codicil is annexed: but that, where there is a complete will, and
an

(i) *Robinson v. Whitley*, 9 Ves. 580; *Barclay v. Wainwright*, 3 Ves. 466; *Coote v. Boyd*, 2 Br. 528.

(k) *Hurst v. Beach*, 5 Mad. 360.

(l) *Lady Gainsborough's case*, 2 Freem. 189; *Taylor v. Taylor*, 1 Atk. 386; *Brown v. Selwyn*, Ca. temp. Talb. 242.

(m) *Ingram v. Strong*, 2 Phillim. 312.

an instrument intended (not as a codicil, but,) as the inception of a new will, though not completed; the legacy given by the latter instrument revokes that given by the former, and is substituted in the place of it. With submission, however, to the very learned civilian, this charge, that, the principles laid down by him were not rightly understood elsewhere, may be controverted. It is believed, that, they have all been long understood, and acted upon over and over again, in Courts of Equity. The only doubt in these Courts has been, as to the application of the general rules, when they are met by conflicting principles of (what may perhaps be called an artificial) Equity. That a gift by a codicil must, generally, be considered as accumulative to a gift by the will, has long been settled, in the Court of Chancery (*n*): and it is no modern doctrine of that Court, that, where an intention to substitute a new and distinct will is shewn, the rule turns the other way (*o*).

The application of these general rules, however, requires occasional modification in Equity.

In no Court, of course, can a contingent legacy, given by a codicil, be held a substitution for, or a revocation of, a bequest in the will, to the same amount, but subject to no contingency; the two gifts are of totally different things; and it would be unreasonable to presume that one was intended

A contingent legacy given by a codicil, no substitution for an absolute bequest in the will.

(*n*) *Hooley v. Hatton*, 1 Br. 465; *Osborne v. Duke of Leeds*, 389, note; *Foy v. Foy*, 1 Cox, 5 Ves. 380; *Benyon v. Benyon*, 164⁴; *Baillie v. Butterfield*, 1 17 Ves. 42; *cum plurimis aliis*. Cox, 392; *Ridges v. Morrison*, 1 Br. 389; *Moggridge v. Thackwell*, 1 Ves. Jun. 472; (*o*) *Jackson v. Jackson*, 2 Cox, 43; *Allen v. Callow*, 3 Ves. 294; *Coote v. Boyd*, 2 Br. 528. *Barclay v. Wainwright*, 3 Ves.

A substituted legacy by codicil, is subject to the same incidents as the original bequest. **ed to be satisfied by the other (p).** A substituted, or additional, legacy, given by codicil, must, *prima facie*, be understood to be attended with the same incidents, to be charged upon the same fund, and subject to the same conditions, as the original bequest for which it was substituted, or to which it was added (q).

Slight differences between double provisions by a parent for a child are not regarded: In the case of double provisions by a parent for a child, slight circumstances of difference are not regarded: at least, where the question is, (not whether a bounty is meant to satisfy a debt, but,) whether one bounty is to be substituted in the

a portion, much less than a legacy, has been held to adeem it: place of another (r). And this leaning against double portions has, in some cases, gone to the extent of holding, that, a portion, though much less than a legacy, may operate as an ademption of the legacy (s): such cases receive a much less rigid construction than questions as to the performance,

and a portion settled subject to limitations, may adeem an absolute gift by will. or satisfaction, of a covenant; a Court of Equity will not inquire whether a portion, given by will, was given absolutely to a child, and whether a sum of money, afterwards advanced on the marriage of such child, or other occasion calling for it, was given subject to limitations; but, unless contrary intention appear clear, will hold the portion advanced by the parent, or person standing *in loco parentis*, in his lifetime, an ademption of the legacy given

(p) *Hodges v. Peacock*, 3 Ves. 737. *Cooper v. Day*, 3 Meriv. 156.

(q) *Crowder v. Clones*, 2 Ves. Junr. 450; *Chatteris v. Young*, 6 Mad. 31; *Learcroft v. Maynard*, 1 Ves. Jun. 279; (r) *Hartop v. Hartop*, 17 Ves. 191; *Twisden v. Twisden*, 9 Ves. 427. See, *ante*, p. 284.

(s) *Ex parte Pye*, 18 Ves. 151.

given by his will (*t*): whether such legacy be, or be not, described in the will as a portion (*u*). So, where portions for children are provided by settlement, or any means whatsoever, (which the parent is bound to make good,) if the parent give a provision, by will, for a portion; this is held to be an advancement made and secured in his lifetime; therefore, it is a satisfaction, *prima facie*, and unless there are circumstances to shew it is not so intended (*w*): and a slight difference in the time of payment of the two provisions, (though, if the question arose out of a transaction originating with a stranger in blood, it might repel the presumption of intended satisfaction,) will not, as between parent and child, be regarded (*x*). But, property, either real or personal, taken by a child under the intestacy, or partial intestacy, of the parent, cannot be considered as an advancement secured in the parent's lifetime (*y*); such property, therefore, is no satisfaction of a portion: nor is real estate, or a particular part of the personal estate, given to any child by the will of a parent who dies partly testate and partly intestate, ever brought into hotch-pot, preparatory to a division of the residue

A provision by a parent's will, for a portion, may satisfy his covenant to secure it in his lifetime:

But property taken by a child under the intestacy of his parent, is no satisfaction of a portion:

(*t*) *Trimmer v. Bayne*, 7 Ves. 515; *Twisden v. Twisden*, ubi *suprà*; *Monck v. Lord Monck*, 1 Ball & Beat. 304.

(*u*) *Ex parte Pye*, 18 Ves. 153.

(*w*) *Leake v. Leake*, 10 Ves. 489; *Onslow v. Michell*, 18 Ves. 494; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529; *Rickman v.*

Morgan, 1 Br. 67, 2 Br. 396; *Tolson v. Collins*, 4 Ves. 491; *Barrett v. Beckford*, 1 Ves. Senr. 520.

(*x*) *Sparks v. Cator*, 3 Ves. 535; *Gartshore v. Chalie*, 10 Ves. 14.

(*y*) *Onslow v. Michell*, 18 Ves. 494.

sidue undisposed of under the statute of distributions (x).

A codicil does not set up again a lapsed, adeemed, revoked, or satisfied legacy:

Though, as we have seen, in most cases, a codicil has the effect of a republication (a), (supposing it to be duly attested, if it relate to real estate;) yet, a lapsed legacy, or one which has been adeemed, revoked, or satisfied, is not set up again by a codicil, merely ratifying and confirming the will generally. To allow such an effect to such a codicil, would, in the case of a lapsed legacy, be permitting the codicil to operate in contradiction to the operation of Law: and in the cases of an adeemed, revoked, or satisfied legacy, such a construction would be in contradiction to the acts of the testator. Such a ratification is to be understood, only as it is consistent with the other acts done by the testator: correctly speaking, it does not operate by way of republication (b). And even where the codicil has the effect of a republication, if the codicil were made with reference to a particular subject upon which it cannot act,—to a power, for instance, which is gone—another subject, not in the contemplation of the testator, will not be affected by the codicil; which must be construed with reference to the real intent (c).

and a codicil made for a particular purpose, will not affect another subject not contemplated by the testator.

The construction of the word "payable" in a will, may be a nice question:

When a will creates a trust, subject to a previous life-interest given, to pay and transfer to certain

(x) *Twisden v. Twisden*, 9 Ves. 425: see, *ante*, pp. 284, 285.

(a) *Hulme v. Heygate*, 1 Meriv. 294: and see, *ante*, p. 313.

(b) *Drinkwater v. Falconer*,

2 Ves. Senr. 626; *Izard v. Hurst*, 2 Freem. 224; *Monck v. Lord Monck*, 1 Ball & Beat. 306.

(c) *Holmes v. Coghill*, 7 Ves.

505: see, *ante*, pp. 296 & 306.

tain individuals the trust funds, equally, at twenty-one; with a clause of survivorship in case any one, or more, should die, before his, or their, share, or shares, become payable; and a limitation over in case the whole number should die before the said trust monies become payable by virtue of the will: the word "*payable*" is, here, a word of ambiguous import; it may either have reference to the capacity of the persons to take; in which sense, the age of twenty-one is the period fixed by the will, as the time at which the shares shall be payable; or, the word may be understood in another sense, as referring to the interest of the tenant for life, till whose death the shares could not be payable. The distinction may be of the utmost importance with regard to the limitation over; but the true construction, in every case of the kind, must be collected from the context, and the evidence it affords of the testator's intention (*d*). And one doubtfully expressed bequest may be explained, by the testator's own exposition as to another bequest of a similar nature (*e*). So, a legacy, given in trust for two children; *when* they shall attain twenty-one, to be equally divided between them; and in case both should die in their minority, then over; will be held to be postponed as to *possession only* by the word "*when*," and not as to the vesting.

the true sense must be collected from the evidence which the context affords of the testator's intention.

The same criterion may shew, that the word "*when*" is to be applied to the possession only, and not to the vesting of a legacy;

(*d*) *Hallifax v. Wilson*, 16 Ves. 172; *Blamire v. Geldart*, 16 Ves. 316; *Bayard v. Smith*, 14 Ves. 476; *Hope v. Lord Clifden*, 6 Ves. 499; *Schenk v. Leigh*, 9 Ves. 310.

(*e*) *Stenhouse v. Mitchell*, 11 Ves. 357; *Turner v. Moor*, 6 Ves. 559; and see *Swayne v. Fawkenner*, Show. P. C. 209; *Foubert v. De Cresseron*, Show. P. C. 196.

ing (*f*). But, to justify this construction, there must be other circumstances, or expressions, in the will, shewing such to have been the testator's intent; for, the word "when"—standing by itself, unqualified and unexplained—is a word of condition; denoting the time when the gift is to commence (*g*): the absolute gift of the intermediate interest would denote a clear intention that the legacy should vest (*h*). The word "then," in the limitation of estates is, not an adverb of time, but, of relation to some conditional antecedent (*i*).

and the word "then" is not necessarily an adverb of time.

The phrase "legal representatives" admits two constructions; the context must determine the proper one.

The same rule holds, if a testator direct that his property shall pass "according to law."

A bequest to the testator's "legal representatives," may mean, either the artificial representation granted by the Ecclesiastical Court; or it may be intended to point out those who would take under the statute of distributions. Taking the words by themselves, the first would be the proper construction; but the context may shew that, the testator meant his next of kin, within the statute; and the Court, if satisfied that such was the intent, will carry it into execution (*k*). So, if a testator direct, that, the whole of his property shall pass by his codicil, "according to law," save and

(*f*) *Branstrom v. Wilkinson*, 7 Ves. 422; *Lane v. Goudge*, 9 Ves. 230; *Lambert v. Parker*, Coop. 145.

(*g*) *Hanson v. Graham*, 6 Ves. 243; *Leake v. Robinson*, 2 Meriv. 386; *Scott v. Chamberlayne*, 3 Ves. 303.

(*h*) *Hanson v. Graham*, 6 Ves. 250.

(*i*) *Dormer v. Beauclerk*, 2

Atk. 310; *Reeves v. Brymer*, 4 Ves. 698; *Pinbury v. Elkins*, 1 P. Wms. 564; *Bigge v. Bensley*, 1 Br. 190.

(*k*) *Jennings v. Gallimore*, 3 Ves. 147; *Long v. Blackall*, 3 Ves. 490; *Bridge v. Abbot*, 3 Br. 226; *Evans v. Charles*, 1 Anstr. 132; *Horseman v. Abbey*, 1 Jac. & Walk. 387; *Holloway v. Holloway*, 5 Ves. 402.

and except certain specified legacies; and, afterwards, by an unconnected clause, he appoint an executor: although neither construction is free from difficulties, it has been held, that, it is more natural to infer an intention in favor of the next of kin, than of the executor (*l*).

It is a rule of Law, that, whoever claims under a will as "heir male of the body," so as to take by purchase, must be *right* heir, as well as *nearest* heir *male* descendant of the body of the person under whom he claims. To take by descent, it is sufficient to be nearest in descent, claiming all along through males, notwithstanding a female be heir general; this has long been established as the true construction of the statute *de donis* (*m*): but, to take by purchase, the claimant must be heir general as well as heir male (*n*). Still, Lord Hardwicke, whilst admitting the rule, held it not to be so universal as to admit no exceptions; and, accordingly, in a case where such appeared clearly to have been the intention of the testator, his Lordship decided, that, the heir male took by purchase, though he was not heir general (*o*). For the word "heirs," in a will, is always understood as applicable to such heirs, only, as the testator meant; and this construction is frequent even in legal limitations.

It is a general rule, that no one can take, by purchase, as "heir male of the body," who is not right heir:

but, the rule is not absolutely without exception:

for the construction of the word "heirs," in a will, is governed by the intent:

(*l*) *Lord Cranley v. Hale*, 14 Ves. 310. *Ferrers*, 2 P. Wms. 2.

(*m*) Stat. 13 Edw. 1, (or Westm. 2), c. 1. (*o*) *Newcomen v. Bethlem Hospital*, Ambl. 11; and see *Pybus v. Mitford*, 1 Ventr.

(*n*) *Shelley's case*, 1 Rep. 103, Co. Litt. 24, b; and see Mr. Hargrave's third note, thereto subjoined; *Daves v.* 381; *Counden v. Clerke*, Hob. 34; *Austen v. Taylor*, 1 Eden, 365; *S. C. Ambl.* 377.

Thus a devise to a man and his heirs, with remainder to one who may be the devisee's heir at law, is construed as an estate tail.

tions (*p*). Thus, where a devise is made to a man and his heirs, and, if he die without heirs, remainder over to another who is, or may be the devisee's heir at law; such limitation will be good, and the first limitation construed an estate tail, not a fee; though if the second limitation be to a stranger, it is merely void, and the first limitation is a fee simple. The reason of the distinction is, that, in the case last put, there is no intent appearing to make the words carry any other sense than what they import at Law; but in the former, it is impossible the devisee should die without an heir, while the remainder-man, or his issue, continue; and therefore the generality of the word heirs will be restrained to heirs of the body (*q*).

A testator's words are to be construed according to their legal effect, unless he clearly intended to use them in a different sense.

Thus, an annuity charged upon leasehold estate, "during the term of the said lease," will be a charge upon every renewal of the lease.

It is, however, a sound general rule of construction, that, the words made use of by a testator shall be interpreted according to their legal effect and operation; unless it clearly appear, that, he intended to use them in a different sense (*r*). If, therefore, a bequest of an annuity be charged upon a testator's leasehold estate, "during the term of the said lease;" though it may be, probably enough, suspected, that, the testator imagined the annuity would cease with the actually existing lease; yet,
as,

(*p*) *Allanson v. Clitherow*, 1 Ves. Senr. 25; *Durbison v. Beaumont*, Fortescue, 22, 25, 27, 31.

(*q*) *Tyte v. Willis*, Ca. temp. Talb. 1; *Attorney General v. Gill*, 2 P. Wms. 370; *Nottingham v. Jennings*, 1 P. Wms. 24.

(*r*) *Thelluson v. Woodford*, 4 Ves. 329; *Holloway v. Holloway*, 5 Ves. 401; *Deane v. Test*, 9 Ves. 152; *Ex parte The Earl of Ilchester*, 7 Ves. 368; *Attorney General v. Vigor*, 8 Ves. 294; *Perry v. Woods*, 3 Ves. 206.

as, in contemplation of Law, whoever has an interest in a lease has an interest in the renewal thereof, and when an additional term is granted the old may be said to be still in being (*s*); upon these grounds, an annuity so bequeathed will be a charge upon every renewal obtained by the devisee of the leasehold lands; but the annuitant must contribute, in proportion to his interest, towards the expenses attending such renewals (*t*).

It would be a manifest perversion of the general rule of construction, above stated, if it were applied without the qualifications by which it ought to be restricted: no Court will ever entrap a testator in words, not allowing him to explain them (*u*). Although a particular sentence in a will, therefore, if it stood alone, might furnish a legal inference of a certain mode of distribution; yet Courts both of Law and of Equity hold, that, for the purpose of collecting the intention, every part of the will must be considered (*w*). The niceties of grammar may, in some instances, allow a sentence, which is included within a parenthesis, to be considered as totally independent, or even to be entirely rejected as superfluous (*x*); but no such liberty must, (at least without absolute necessity, and

But, in order to collect the intention, Equity will look, not at a particular sentence, but, at the whole will.

The grammatical skill of the writer, and the critical niceties of punctuation, will not be allowed to control the construction of a will.

(*s*) *Rame v. Chichester*, Ambl. 719; *Randall v. Russell*, 3 Meriv. 196.

(*t*) *Winslow v. Tighe*, 2 Ball & Beat. 206.

(*u*) *Crone v. Odell*, 1 Ball & Beat. 472; 480; *Loveacres v. Blight*, Cowp. 355.

(*w*) *Gitting v. Steele*, 1 Swanst. 28; *Bootle v. Blundell*, 1 Mer. 217; *Wright v. Atkins*, 1 Turn. & Russ. 158; *Pitman v. Stevens*, 15 East, 510.

(*x*) *Gascoigne v. Barker*, 3 Atk. 9.

and to avoid repugnancy,) be taken with a testamentary instrument; the sense of which must, if possible, be collected from the whole context, not from the punctuation; otherwise, the effect of a will might depend on the grammatical skill of the writer (*y*). It is not, however, to be inferred, that, in legal instruments, the use of a parenthesis is never to influence the construction; on the contrary, it may even be *supplied* in a will where it is deficient, if such an improvement upon the punctuation be necessary to make the whole clear and in-

Every word of a will, not inconsistent with the general intent, ought to have effect given to it:

if two passages be totally inconsistent, the last, it seems, ought to prevail.

telligible (*z*). For, nothing is better established, as a general rule, than that effect ought to be given to every word of a will (*a*); provided an effect can be given to every word not inconsistent with the general intent of the whole will, taken together. If the general intention can be collected, Courts of Equity will be anxious to adapt every part so as to meet that general intent: but if two parts of a will are totally irreconcilable, it was Lord Alvanley's repeatedly expressed opinion, that, the latter ought to prevail; and, that, the subsequent words must be taken as an indication of a subsequent intention (*b*). This rule, however, was restricted by the learned Lord to those cases, only, where two parts of a will are totally inconsistent, so that it is impossible for them to coincide:

(*y*) *Sanford v. Raikes*, 1 Ves. Junr. 270; *Gray v. Minnethorpe*, 3 Ves. 105.

(*z*) *Doe v. Allcock*, 1 Barn. & Ald. 142: and see *Cave v. Cave*, 2 Eden, 145.

(*a*) *Collet v. Lawrence*, 1 v. *Andrey*, 5 Ves. 467.

(*b*) *Constantine v. Constantine*, 6 Ves. 102; *Sims v. Doughty*, 5 Ves. 247; *Milson*

cide (c): in all other cases, as there can be no will at all previous to execution, the testator must be understood to have contemplated every part as taking effect at one and the same time (d).

Equity will never suffer a positive bequest to be controlled by inference and arguments from the other parts of the will (e). Slight circumstances may, indeed, be held sufficient to qualify and restrain general words; in order to afford an interpretation of a will, which would otherwise be repugnant (f): but, an express disposition in an early part of a will, must not receive an exposition from a subsequent passage, affording only a conjectural inference (g): a testator must never be supposed to have meant more than he has expressed (h): nor will a Court of Equity reject, on the other hand, words having an obvious meaning; upon a suspicion, that, the testator did not know what he meant, when he used them (i).

Slight circumstances may qualify words otherwise repugnant;

but a positive bequest cannot be controlled by conjectural exposition.

But, although a Court is to determine as to the intent of a testator from the words which he has used; yet, when the general intention is plain, it will be aided by taking considerable liberties with the construction: thus, it has been held not necessary

Yet, where the general intent is plain, it may be aided by construction;

thus, words may be transposed, to

(c) *Constantine v. Constantine*, *ubi supra*; *Jones v. Colbeck*, 8 Ves. 42; *Galland v. Leonard*, 1 Swanst. 163.

(d) *Langham v. Sandford*, 2 Meriv. 11, 22.

(e) *Jones v. Colbeck*, 8 Ves. 42: see, however, *Wright v. Atkyns*, 1 Turn. & Russ. 158.

(f) *Thelluson v. Woodford*,

4 Ves. 325. See *infra*.

(g) *Collet v. Lawrence*, 1 Ves. Junr. 269; *Roach v. Haynes*, 8 Ves. 590.

(h) *Browne v. Lord Kenyon*, 3 Mad. 415.

(i) *Milnes v. Slater*, 8 Ves. 306; *Southcote v. Watson*, 3 Atk. 233; *Elwin v. Elwin*, 8 Ves. 555, 561.

meet the intent
apparent on the
face of the will;

but where the
words, as they
stand, are plain
and sensible,
transposition is
never allowed.

Effect of a re-
cital in a will, as
of a previous be-
quest, may be
tantamount to a
present disposi-
tion.

sary to take the words in the order in which they stand, if by their transposition the apparent intent of the testator would be better answered (*k*): or, as the rule was laid down more restrictedly in another case, (and it seems less open to objection when so limited,) “a Court of Law as well as of Equity—and a Court of Equity has no greater latitude in construction of wills, and transposing the words thereof, than a Court of Law has—will, to make sense of a will otherwise insensible, and to make it take some effect rather than to be totally void, often transpose words to attain the intent that, on the face of the will, the testator had: but, in no case, where the words are plain and sensible, is a transposition made, in order to create a different meaning and construction; much less to let in different devisees and legatees; which is a very different thing from the case where the persons to take are certain, and the question is only concerning the construction of the words creating the limitation, or interest to be taken (*l*).”

If a testator, by a subsequent paper, profess to have bequeathed, by a former instrument, that which he has not bequeathed; that paper may be proved as testamentary; and the property will pass (*m*). So, it seems, the recital of a gift, as antecedently made in the same will, may amount to a gift

(*k*) *East v. Cook*, 2 Ves. Senr. 32; *Brownsword v. Edwards*, 2 Ves. Senr. 248; *Boon v. Cornforth*, 2 Ves Senr. 278.

(*l*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Senr.

74: and see *Chambers v. Brailsford*, 19 Ves. 654; *Eden v. Smyth*, 5 Ves. 355; *Loveacres v. Blight*, Cowp. 355, 357.

(*m*) *Druce v. Dennison*, 6 Ves. 397.

a gift of personalty; but, admitting this, a Court will at least require to see, very clearly, that, there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest (*n*). And, on the other hand, a bequest actually made, or a power given, cannot be controlled by the *reason* assigned. The assigned reason may aid in the construction of doubtful words, but cannot justify the rejection of words that are clear (*o*). A false recital in a will has never been allowed to amount to a devise of real estate (*p*).

A positive bequest not controlled by the reason assigned:

The word "issue" is properly a word of purchase, and means descendants. It is used, however, in the statute *de donis* without an idea of purchase annexed to it; and in wills it constantly acts in a double capacity, as will best answer the intention (*q*). If the word issue appear to have been used by a testator with an intention to describe, not descendants generally, but, children, Courts will give it that construction: we have seen, however, that, the operative and effective part of a clause will not be controlled by ambiguous words, occurring in the introductory part of it (*r*):

The word "issue," in a will, is deemed either a word of purchase, or of limitation, as best suits the evident intention:

but ambiguous words in one passage, cannot control another passage which is unequivocal.

OR

(*n*) *Smith v. Fitzgerald*, 3 Ves. & Bea. 8. A mere recital in a will of a gift "therein after made," is inoperative; *Frederick v. Hall*, 1 Ves. Jun. 396.

(*o*) *Cole v. Wade*, 16 Ves. 46.

(*p*) *Bamfield v. Popham*, 1 P. Wms. 59; *Right v. Hammond*, 1 Str. 428; *Wright v. Wivell*, 3 Lev. 259.

(*q*) *Dodson v. Grew*, Wilmot, 277; *Lyon v. Mitchell*, 1 Mad. 473; *Marshall v. Bousfield*, 2 Mad. 174; *Freeman v. Parsley*, 3 Ves. 423; *Knight v. Ellis*, 2 Br. 578; *Shaw v. Weigh*, Fortescue, 74.

(*r*) *Lord Orford v. Churchill*, 3 Ves. & Bea. 67; *Hampson v. Brandwood*, 1 Mad. 388; *Leigh v. Norbury*, 13 Ves. 344; *Doe v. Pearce*, 1 Price, 365.

or a subsequent clause of limitation, as to one subject of devise, be governed by words of introduction which, though clear, are not fairly applicable to that particular subject (*s*); nor, *vice versâ*, can a previous part of a will, which, taken by itself, is clear, be altered, or controlled, by a subsequent designation, the meaning of which is doubtful (*t*).

Where the intent requires it, material words may even be supplied:

this strong measure, however, is rarely employed, except where a will has created an executory trust:

Where the intent is clear, but, in order to give effect to it, the strong measure of supplying material words is absolutely necessary, it should seem, that, neither Courts of Law (*u*), nor Courts of Equity (*w*) have deemed it an excess of their authority to do so (*x*). Generally speaking, however, the liberty of supplying new terms, and remodelling a loosely expressed purpose, only takes place where a will creates an *executory* trust, unaccompanied with the limitations necessary to secure it: for instance, where the informal language of a testator would put the whole property devised into the power of the first taker, to the exclusion, perhaps, of those who were the principally intended objects of the testator's bounty; there, when the assistance of Equity is required to direct a conveyance, those directions

(*s*) *Denn v. Gaskin*, Cowp. 661. v. *Chamberlayne*, 4 Ves. 57; *Holmes v. Craddock*, 3 Ves.

(*t*) *Barker v. Lea*, 3 Ves. & Bea. 117. See *suprà*. 321.

(*u*) *Doc v. Micklem*, 6 East, 492. 368; *S. C.* on appeal, Ambl. 671; *Baskerville v. Baskerville*, 2 Atk. 280; *Green v. Stevens*, 17 Ves. 76; *Papillon v. Voice*, 2 P. Wms. 478;

(*w*) *Dodson v. Hay*, 3 Br. 407; *Brownsword v. Edwards*, *ubi suprà*; *Morse v. Lord Ormond*, 5 Mad. 114; *Mellish v. Mellish*, 4 Ves. 50; *Phillips v. Lord Glenorchy*, *Ca. temp. Talb.* 18.

directions will be given according to the intent apparent upon the will; if that intent be not contrary to the rules of Law: and though the words of the bequest may omit the necessary limitations, these will be supplied; and a strict settlement directed, if the clear intent would otherwise be liable to be defeated. But, whenever an express, immediate interest is devised, it has been pronounced not to be in the power of a Court of Equity, by construction, to make the devise pass any other interest than that which is expressed (y). It is true, that, according to the well-known rule in *Shelley's* case (z), wherever the ancestor takes an estate of freehold, and an immediate remainder is thereon limited, in the same gift or conveyance, to his heirs, or heirs in tail, (if both the estates be of the same quality, that is, if both be legal, or both equitable, estates,) such remainder is immediately executed in the ancestor. So, although an estate for life, or in tail, be interposed between the freehold taken by the ancestor, and the gift, limited in the same instrument, to his heirs, this remainder to the heirs vests in the ancestor. We have, indeed, just seen, that, in respect of executory trusts created by will, or marriage articles, and not carrying the legal estate; Courts of Equity, in favor of the intent, will overstep the legal operation of the words by which the trust is created: but, in all other instances, the rule in *Shelley's* case is as much regarded in Equity

when an immediate interest is devised, Equity will not, by construction, alter the interest expressly given.

Effect of the rule in *Shelley's* case.

not less binding in Equity than at Law, where the legal estate is given: and if not always adhered to in cases of executory trusts, is never departed from except to support a limitation over.

(y) *Wright v. Pearson*, 1 Eden, 123; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 571. (z) 1 Rep. 93. See this subject most lucidly discussed in *Fearne's Conting. Rem.* chap. 1, sect. 5.

ty as at Law. And it is also fully settled, that, whatever will, directly or constructively, constitute an estate tail in land, will pass an absolute interest in personal property (*a*). This, it is plain, is not in contradiction to the declaration of Lord Hardwicke, that, if ever a greater latitude of construction is admitted in Equity, with respect to wills, than would be allowed at Law; this never takes place to defeat, but to support a limitation over (*b*).

The doctrine by which an estate for life, given to a parent, is sometimes construed an estate tail, in order to make his children take as purchasers, applies only to real estate.

It should be observed, however, that, the doctrine of *cy pres*, according to which the words of a testator are sometimes moulded, to effectuate his general intention, by construing an express estate for life, given to a parent, as if it were an estate tail, where his children, the principal objects of the intended bounty, could not take as purchasers (*c*); extends only to real estate: and never was held applicable to personal property (*d*). And with respect to real estate, it has been judicially, and repeatedly, declared, that, the doctrine of *cy pres* has already been carried, at least, to the very verge of the Law; that, it would not be proper to go one step farther; and that, the cases in which it has been attempted to combine the general intent with the particular intent, have gone far to destroy both (*e*). The same words may be differently

The same words have the same

(*a*) *Britton v. Twining*, 3 Ves. Junr. 364; *Crone v. O'Dell*, 1 Ball & Beat. 470; *Robinson v. Hardcastle*, 2 T. R. 254.

(*b*) *Fonnereau v. Fonnereau*, 3 Atk. 317; *Shephard v. Lessingham*, Ambl. 125.

(*d*) *S. C.* p. 365; *Leake v. Robinson*, 2 Meriv. 379.

(*c*) *Routledge v. Dorrit*, 2

(*e*) *Brudenell v. Elwes*, 7 Ves. 390; *S. C.* 1 East, 450.

differently construed, and have different operations, when applied, in the same will, to different descriptions of property, governed by different rules (*f*). For though, where the same words occur in different parts of the same will, it may be a sound general rule, to give them the same meaning throughout (*g*); yet, we have seen, that, the same words of limitation which will give an estate tail in freehold property, will carry the absolute interest in leasehold (*h*).

meaning given them throughout a will; only when they are applied to the same sorts of property.

When it is once established that material words may, in any instance, be added, to eke out a testator's meaning, there can be no difficulty in acceding to the propriety of rejecting repugnant words (*i*); and to strike them out as surplusage and void, where the admission of a loose phrase would go to alter a large, plain, and particular disposition before expressed (*k*).

Repugnant words may be rejected.

The cases are numerous which establish, that, the word "*or*" may be construed conjunctively, and the word "*and*" disjunctively, in order to give effect to all the words of a will (*l*); or to afford

The word "*or*" may be construed conjunctively; and the word "*and*" disjunctively;

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| <p>(<i>f</i>) <i>Forth v. Chapman</i>, 1 P. Wms. 667; <i>Keiley v. Fowler</i>, Wilmot's notes, 313; <i>Elton v. Eason</i>, 19 Ves. 77.</p> <p>(<i>g</i>) <i>Goodright v. Dunham</i>, 1 Dougl. 267; <i>Doe v. Jesson</i>, 5 Mau. & Selw. 99; <i>Haws v. Haws</i>, 3 Atk. 526; <i>Turner v. Moor</i>, 6 Ves. 559.</p> <p>(<i>h</i>) <i>Exell v. Wallace</i>, 2 Ves. Senr. 325; <i>Crooke v. De Vandes</i>, 9 Ves. 203; <i>Green v. Stephens</i>,</p> | <p>17 Ves. 73.</p> <p>(<i>i</i>) <i>Boon v. Cornforth</i>, 2 Ves. Senr. 278; <i>Keiley v. Fowler</i>, Wilmot, 309.</p> <p>(<i>k</i>) <i>Green v. Armsteed</i>, Hob. 65; <i>Countess of Bridgewater v. Duke of Bolton</i>, 6 Mod. 100; a case said by Lord Hardwicke (in 1 Ves. Senr. 11) to be well reported: <i>Roberts v. Kyffyn</i>, 1 Barnard. Cha. Ca. 261.</p> <p>(<i>l</i>) <i>Bell v. Phyn</i>, 7 Ves. 459.</p> |
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ford a reasonable construction (*m*); it has, however, been said, that, this convertible use of the words can only be justified by strong necessity; and where the clause in which either word is found would, without such construction, be absolute nonsense (*n*): and, at all events, it must be distinctly shewn, that, the intention of the testator requires such a construction (*o*). One strong instance, in which the word "or" has, in order to effectuate the intent, had a meaning different from its obvious one assigned to it, is the case in which Lord Thurlow decided, that, a bequest to a woman, or to her children for ever, should be construed to give the mother an interest for life, with remainder to the children at her death (*p*).

Strong instance of the free construction of the word "or."

When grandchildren are allowed to take under a bequest to "children."

Under a bequest to "children," where there are children to answer the proper description, grandchildren are not permitted to share along with them; although where there is a total want of children, grandchildren have been let in, under a liberal construction of the word "children (*q*):" which is a word of purchase in its primary sense; and is never construed as a word of limitation, unless the testator's intention cannot otherwise have any effect (*r*).

Where

(*m*) *Maberley v. Strode*, 3 Ves. 454.

v. Brome, 7 Ves. 128.

(*n*) *Fitzgerald v. Lord Falconberge*, Fitz-Gib. 215, 222.

(*q*) *Reeves v. Brymer*, 4 Ves.

698; *Royle v. Hamilton*, 4

Ves. 439; *Radcliffe v. Buck-*

(*o*) *Turner v. Moor*, 6 Ves. 560; *Weddell v. Mundy*, 6 Ves. 343.

ley, 10 Ves. 201; *Earl of Orford v. Churchill*, 3 Ves. & Bea. 69.

(*p*) *Newman v. Nightingale*, 1 Cox; 341 : and see *Longmore*

(*r*) *Buffar v. Bradford*, 2 Atk. 222.

Where it is alleged, that, the execution of a will has been fraudulently obtained, by a misrepresentation of the purport and effect of one of its clauses; a Court of Equity may, if sufficient grounds appear, direct an issue, to inquire whether the clause complained of does, in truth, constitute part of the will of the testator; and if the jury find, that, the clause does not constitute part of the will, but is void for fraud; a decree will be made in Equity accordingly (s).

An issue may be directed, to inquire whether a will was executed by a testator in consequence of a misrepresentation.

The facilities of committing fraud would be so great if parol evidence were easily let in, to explain a testator's meaning, that, in most instances, such evidence is rejected (t); and in those cases in which it is admitted, it is always scrutinized with jealous vigilance; its reception is guarded by strict precautions; and, generally speaking, (though with some other exceptions, to be presently noticed) its effect is limited to the sole purpose of rebutting a presumption, which would otherwise go to control a legal right (u). When no such presumption arises, and where the only difficulty proceeds from an ambiguity *patent* on the face of a will; the vast preponderance of authority has firmly established, that, parol evidence cannot be let in: it would,

But parol evidence, to explain a testator's meaning, is seldom admitted, unless to rebut a presumption which would go to control a legal right.

A patent ambiguity lays no ground for the admission of parol evidence

(s) *Hippesley v. Homer*, 1 Turn. & Russ. 48, n. 397; *Clennel v. Lemthwaite*, 2 Ves. Junr. 474; *Langham v.*

(t) *Ulrich v. Litchfield*, 2 Atk. 373; *Brown v. Selwyn*, Ca. S. C. on appeal, 2 Meriv. 17, temp. Talbot, 242; *Nicholls v. Osborn*, 2 P. Wms. 420; *Doe v. Chichester*, 4 Dow, 90. 23; *Petit v. Smith*, 1 P. Wms. 9; *Blinkhorne, v. Feast*, 2 Ves. Senr. 58; *Lake v. Lake*, Ambl.

(u) *Trimmer v. Bayne*, 7 Ves. 127; *Lynn v. Beaver*, 1 Turn. & Russ. 68.

would, indeed, be mere pedantry to cite cases in support of a position which, so long ago as in Lord Bacon's time, was received as a fixed maxim of Law (*w*); if ambiguities of this description, in one sentence of a will, cannot be explained by the context, the defect is irremediable. But, where the words of the will are, in themselves, plain; yet, a difficulty in applying them arises from a state of facts and circumstances *dehors* the will; to explain such *latent* ambiguities, evidence is constantly admitted (*x*): thus, "if a man has two sons both baptized by the name of John, and conceiving that the elder (who has been long absent) is dead, devises his land to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him; and, if it be denied, he may produce witnesses to prove his father's intent, and that he thought the other to be dead (*y*)."
It may happen, that, in cases justifying the admission of parol evidence, such evidence, when received, may be insufficient to remove the latent ambiguity; and in such cases the devise must necessarily be void: thus, if a gift by will be made to a person by name, but with a description inapplicable to that person superadded, which description, however, it is shewn by evidence another individual precisely answers: the evidence to this effect will leave the intention in, at least, as much obscurity as clouded it on the face

which, however, is always received to explain latent ambiguities:

thus, where two persons bear the same name, evidence may be given to shew which of the two was meant.

Where a gift is made to one by name, but a description is added, not applicable to the person named, but which another precisely answers; the gift must fail, unless

(*w*) Lord Bacon's Maxims of the Law, *Regula* 23. 1 Ves. Junr. 415.

(*y*) Lord Cheyney's case, 5 Rep. 69; *Doe v. Chichester*, 4 Dow, 90, 93.

(*x*) *Baugh v. Read*, 1 Ves. Jun. 259; *Delmare v. Robello*,

face of the will; and the devise must fail for uncertainty, unless it can be indisputably proved, that, the name of the party specified was inserted by mistake, instead of the name of the party answering the description annexed (*x*). When, indeed, a person is clearly made out by averment, to be the person meant by a mistaken devise, and there can be no other to whom it may be applied, the misnamed devisee will take (*a*): but the evidence must be conclusive (*b*). Should both the name and the description, used by a testator to designate the object of his bounty, belong equally to two individuals; these are facts *dehors* the will raising a latent ambiguity, to resolve which parol evidence may be admitted: and if one of the parties was very intimate with, and the other but little known by, the testator, the presumption in favor of the former will be very strong (*c*).

it be proved that the name was inserted by mistake.

When both the name and the description apply equally to two individuals, evidence to shew which was meant is admitted.

It is quite settled, that, an inaccurate description, unnecessarily superadded, will not vitiate a devise to objects otherwise sufficiently described with correctness (*d*). And a mere mistake in the christian name (*e*), or the spelling of the surname (*f*), or even in both (*g*), will not make a bequest void, if it can be distinctly shewn by evidence who was the party

An inaccurate description unnecessarily added, will not vitiate a devise.

(*x*) *Thomas v. Thomas*, 6 T. R. 676. Ves. 388; *Holmes v. Custance*, 12 Ves. 280.

(*a*) *Rivers' case*, 1 Atk. 410.

(*e*) *Parsons v. Parsons*, 1

(*b*) *Del Mare v. Rebello*, 3 Br. 451.

Ves. Junr. 266; *Smith v. Conney*, 6 Ves. 42.

(*c*) *Careless v. Careless*, 19 Ves. 604.

(*f*) *Masters v. Masters*, 1 P. Wms. 425.

(*d*) *Smith v. Campbell*, Coop. 278; *Stockdale v. Bushby*, 19

(*g*) *Beaumont v. Fell*, 2 P. Wms. 141.

Rules as to correcting mistakes in, or supplying the omission of, christian names.

party really intended to take: and where a blank is left for the christian name of a legatee, that may be made good by averment (*h*): but a surname left in blank cannot be so filled up (*i*): though there is an instance (it is believed a solitary one) in which Lord Rosslyn ordered the Master to receive evidence, previously rejected by him, to shew who a legatee, described in the will simply as "Mrs. G.," was (*h*). Without presuming to insinuate, that, this decision transgressed principle; a belief may be permitted, that, it went to its extreme limits: it seems barely reconcileable with the axiom that parol evidence is not admissible to explain a *patent* ambiguity.

If a legacy be given to the *two* daughters of a man who has *three*; the legacy will be divided among all.

If a testator give a legacy to the "two" daughters of a man who in fact has *three* daughters, this is an ambiguity not capable of being removed by evidence; but, the practice of the Court of Chancery (though the principle has been doubted), treats this as a mere slip of expression, and all the daughters are admitted to an equal participation of the testator's bounty (*l*). Following the same course of reasoning, it has been determined, that, if a legacy be given in these terms, namely, "to the *three* children of *A*. the sum of £600 each," and, at the date of the will, *A*. had *four* children, the specified number is to be disregarded, and each child is entitled to a legacy of £600 (*m*).

And if a sum be given to *each* of the *three* children of *A*., who, at the time, had *four* children, *each* of the *four* will be entitled to the specified sum.

Where

(*h*) *Price v. Page*, 4 Ves. 680. 149.

(*i*) *Hunt v. Hort*, 3 Br. 311; (*l*) *Stebbing v. Walkey*, 2 Br. Castledon v. Turner, 3 Atk. 86; *Scott v. Fenhoullhet*, 1 Cox's Ca. 80: see post.
258; *Baylis v. Attorney General*, 2 Atk. 239.

(*m*) *Garvey v. Hibbert*, 19 Ves. 126.

(*k*) *Abbot v. Massie*, 3 Ves.

Where the meaning of an instrument admits a clear construction, that such meaning is "strange" must not be talked of, either upon a deed or a will (*n*): a Court of Equity must not reason from the inconvenient results, and be induced thereby to put a different construction on the words used (*o*); but can only conclude, that, the testator did not see all the consequences of the disposition he has made: still, in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies, which may arise out of one construction, or be avoided by another, have constantly been attended to, with a view, solely, to ascertain the true meaning (*p*). And this qualification of the general rule, which forbids travelling out of the will, must be borne in mind, whenever that rule is urged for the purpose of excluding all consideration of the state of the testator's family: such consideration (there is judicial authority for asserting) has, under certain circumstances, been clear Law, from the time of *Wild's* case (*q*), to the present day. The objection.

Where the meaning of a will is clear, it must not be varied from; but, to ascertain a doubtful meaning, the absurdities which would follow one construction are to be attended to.

And in considerations of this kind, the state of the testator's family is not to be disregarded:

(*n*) *Moseley v. Moseley*, 5 Ves. 259; *Gaskell v. Harman*, 11 Ves. 496.

(*o*) *Innes v. Johnson*, 4 Ves. 573; *Smith v. Streatfield*, 1 Meriv. 361; *Bernard v. Montague*, 1 Meriv. 431.

(*p*) *Earl of Radnor v. Shafto*, 11 Ves. 457; *Leigh v. Leigh*, 15 Ves. 103; *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 129; *Bengough v. Walker*, 15 Ves. 515; *Jenkins v.*

Herries, 4 Mad. 82; *Jones v. Suffolk*, 1 Br. 529; *Phillips v. Chamberlayne*, 4 Ves. 59.

(*q*) 6 Rep. 17. *Wild's* case is said not to have been allowed to be Law, in *Peacock v. Spooner*, 2 Vern. 195: but in the report of the same case in 2 Freem. 114, this *dictum*, for it was at all events no more, does not appear. But even if it did, *Peacock v. Spooner* is a case never followed, unless it occurs in *ip-*

though, by itself, forming no ground for altering the obvious construction of a will.

Quære, as to the opinion given by the Court of King's Bench, in the case of *White v. Barber*.

tion was taken in *Goodinge v. Goodinge* (*r*), and overruled by Lord Hardwicke; whose opinion upon that point has been confirmed by the uniform decision of Courts of Equity ever since (*s*). But, although the state of the testator's family may be taken into account, it seems, in aid of other circumstances; yet, that consideration alone will not authorize a Court of Equity to alter the obvious construction of a will (*t*). It may, however, be difficult to reconcile with this rule, an opinion returned by the Court of King's Bench, to a case directed out of the Court of Chancery: the common Law Judges certified their opinion, that, a testator who, by will, had made a provision for any child with which his wife might prove *enceinte* at the time of his decease; must have intended to comprehend all the children which should be born of his wife, whether before or after his decease. The learned Judges were, therefore, of opinion, that, notwithstanding the defect of expression in the will, children born before the testator's death were virtually included in the provision made for his posthumous children (*u*). Natural feeling would lead every mind to go along with this opinion; had the testator contemplated the situation in which his family was actually left at his death, he probably

sissimis verbis. *Theebridge v. v. Lake*, 1 Wils. 314; *Hampshire v. Pierce*, 2 Ves. Senr. 237; *Webb v. Webb*, 1 P. Wms. 135; 218. See, *post*, p. 352.
Lyon v. Mitchell, 1 Mad. 483. (*t*) *Radcliffe v. Buckley*, 10 Ves. 203; *Godfrey v. Davis*, 6 Ves. 48.
 (*r*) 1 Ves. Senr. 232.
 (*s*) *Crone v. Odell*, 1 Ball & Beat. 481; *Harris v. Bishop of Lincoln*, 2 P. Wms. 136; *Lake* (*u*) *White v. Barber*, 5 Burr. 2708.

probably would have provided for that course of events, exactly in the way in which it was proposed to remedy his omission. But, as the testator had not done so; it may be questionable, how far the decision contradicted the rule, that, no Court is authorized to make a will for a man (*w*). We have, indeed, already seen, that, subsequent marriage, and the birth of a child, may operate a revocation of a will: but then, the two circumstances, it has been repeatedly laid down, must both concur: and marriage alone, or (as in *White v. Barber*) the birth of children alone, have been often pronounced insufficient to work a revocation (*x*). *White v. Barber*, therefore, was not decided, or even argued, on this ground; but upon the "virtual inclusion of children actually born, under a provision for posthumous children." Other cases have held, that, posthumous children should be included in a description of children living at a testator's death; but this, it is believed, is the only case in which a designation of a child *in ventre sa mere* has been held to apply to a child actually born. The judgment humanely established, what the testator, undoubtedly, ought to have done: but, still the question will remain, whether it was he who made a proper will, or whether the Court made it for him.

A Court must not by construction, make a will for a man.

There is no ground for adding an implied case, to that which is expressed in a will, where the implication is not necessary (*y*). Thus, where a testator,

There is no ground for adding an implied case to that which is expressed in the will, where such im-

(*w*) *Humberstone v. Stanton*, 1 Ves. & Bea. 390. *Johnston v. Johnston*, 1 Phillim. 467.

(*x*) *Shepherd v. Shepherd*, 5 T. R. 54, note; cited, *ante*, p. 299, which see: but see, also, (*y*) *Bayard v. Smith*, 14 Ves. 477.

plication is not a necessary one.

When posthumous children may be included in a direction for maintenance; though shut out from any share in the division of their parent's property.

Rate of interest allowed upon legacies given in foreign currency.

General legacies paid in the currency of the country where the will was made; if the property was also situated there.

Parol evidence admitted to explain any re-

a testator, though under every obligation to provide for all his children, so expresses himself, perhaps through inadvertence, as to exclude children born after the making of his will from a share in the distribution of his property; the oversight cannot be supplied by construction: but, when he has directed maintenance, in terms sufficiently general to comprehend all his children, a proper allowance for the maintenance, education and bringing up of all the children will be ordered; notwithstanding the bequest of the capital is, by the terms of the will, limited to children living at the making thereof (x).

Legacies given expressly in the currency of a foreign country, will, it seems, bear interest according to the rate of the country, so long as the money is there employed for the benefit of the general estate (a); but not when the legatees prefer coming against assets in this country; in such case they can only claim the ordinary rate of interest (b). Unascertained or general legacies must be paid in the currency of the country in which the will was made (c); at all events, if the property was also situated there (d): and to shew whether this was, or was not, the case, evidence *dehors* the will may be indispensable. And where a legacy is given on condition that the legatee should be in the

(x) *Matchwick v. Cock*, 3 Ves. 611; *Freemantle v. Taylor*, 15 Ves. 363.

(a) *Raymond v. Broadbelt*, 5 Ves. 206; *Malcolm v. Martin*, 3 Br. 53.

(b) *Bourke v. Ricketts*, 10

Ves. 333.

(c) *Lansdowne v. Lansdowne*, 2 Bligh, 92; *Pierson v. Garnett*, 2 Br. 47.

(d) *S. C. Cockerell v. Barber*, 16 Ves. 465.

the testator's service at the time of his decease; the conversation of the testator, though not admissible to prove upon what terms the legacy was given, to alter, detract from, or add to, the terms of the will; may be the best possible evidence of the fact, that, the legatee was considered by him to be then in his service (*e*). And, generally, where the subject of a devise is described by reference to some extrinsic fact, it is not merely competent, but necessary, to admit extrinsic evidence, to ascertain the fact, and, through that medium, to ascertain the subject of the devise. In such cases, the question is not upon the devise, but upon the subject of it; nothing is offered in explanation of the will, or in addition to it; the evidence is only to ascertain what is included in the description which the testator has given of the thing devised (*f*). This, it must be at once apparent, is a totally distinct thing from resorting to the state and value of a testator's property, as a criterion from which his intention may be collected. Where the terms used by the testator are unambiguous, such a criterion would be inadmissible to affect the construction (*g*). Yet, although Courts may be bound to

ference to extrinsic facts, describing the conditions, or the subject, of a devise.

But the state and value of a testator's property, afford no criterion for determining his intention, where his language is unambiguous:

though where the terms are not

give

(*e*) *Herbert v. Reid*, 16 Ves. 486.

(*f*) *Sanford v. Raikes*, 1 Meriv. 653; *Judd v. Pratt*, 13 Ves. 174; *Druce v. Dennison*, 6 Ves. 400.

(*g*) *Kellett v. Kellett*, 1 Ball & Beat. 542; *Goodtitle v. Edmunds*, 7 T. R. 640; *Doe v. Chichester*, 4 Dow, 93; *Stan-*

den v. Standen, 2 Ves. Junr. 593; *Lord Inchiquin v. French*, Ambl. 40; *Duke of Ancaster v. Mayer*, 1 Br. 466; *Andrens v. Emmot*, 2 Br. 300; *Stephenson v. Heathcote*, 1 Eden, 43; *Druce v. Dennison*, 6 Ves. 400; *Nannock v. Horton*, 7 Ves. 400; *Jones v. Tucker*, 2 Mer. 537; *Bland v. Lamb*, 5 Mad.

plain and express, the situation of the testator and his family may fairly afford some clue to his true meaning.

give effect to the clear import of a will, however revolting to natural feelings the disposition thereby made may be; still, where the words of the will do not peremptorily exclude all extrinsic considerations, it is fair, as stated above, to contemplate the situation of the testator and his family, as some guide to his intention (*h*). The two positions last stated are, on this plain ground, very reconcilable; but, as *obiter dicta* in contradiction to both are to be met with, it has been thought right to support each principle by a citation of more numerous authorities than accords with the general plan of the present writer; who (judging from his own feelings) has deemed that, in most instances, a reference to two or three leading cases in point, would be a more acceptable mode of performing the task he has undertaken, than if he were to swell his work, by transferring to the notes all the manuscript references made in the margins of his collection of reports, having a collateral bearing upon the question he may at the time be engaged with; or than if he condescended to the still easier, but less honest,

413; *Sibley v. Perry*, 7 Ves. 533; *Gittins v. Steele*, 1 Swanst. 29; *Jones v. Curry*, 1 Swanst. 71; *Smith v. Maitland*, 1 Ves. Junr. 364; *Cave v. Cave*, 2 Eden, 144.

(*h*) See, *ante*, pp. 347, 348; *Munyard v. New*, 3 Swanst. 124; *Doe v. Gillard*, 5 Barn. & Ald. 788; *Bland v. Lamb*, 2 Jac. & Walk. 406; *Penticost v. Ley*, 2 Jac. & Walk. 209; *Fonnereau v. Poyntz*, 1 Br. 480; *Finch v.*

Inglis, 3 Br. 425; *Bengough v. Walker*, 15 Ves. 514; *Leigh v. Leigh*, 15 Ves. 104; *Attorney General v. Grote*, 3 Meriv. 319; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 525, 529; *Selwood v. Mildmay*, 3 Ves. 310; *Barksdale v. Gilliat*, 1 Swanst. 565; *Porter v. Tournay*, 3 Ves. 312; *Page v. Leapingwell*, 18 Ves. 466; *Stapleton v. Colvile*, Ca. temp. Talb. 208; *Lynn v. Beaver*, 1 Turn. & Russ. 68.

est, mode of assuming credit for research, by copying without examination, or directing an amanuensis to copy, the references collected by the industry of others: thus, exposing his readers, perhaps, to the useless trouble of looking at cases, which, however appropriately placed where they originally stood, might be found very little applicable to the point which they, deceptively, professed to confirm.

In addition to the grounds upon which it has been already attempted to reconcile, what have been thought, the contradictory declarations with respect to the propriety of admitting, or rejecting, evidence of the state of a testator's property, as some clue to his meaning; it may be observed, that, the apparent discrepancy may be still farther diminished, (it is not asserted that it will be entirely removed,) by recollecting, that, in full one half of the cases cited in which this consideration was deemed inadmissible, the question turned upon the execution, or non-execution, of a *power*; or whether the testator had, or had not, intended to dispose of that which was *his only in a qualified sense*. Whilst, in all the cases cited, without exception, in which the evidence was admitted, the property was absolute in the testator. But, even in the case of a *power*, as the principle is, that, with regard to real estate where there is nothing for the will to operate upon, unless with reference to the power, it must operate as an execution of the power (i); an inquiry into the state of the testator's

Evidence of the state of a testator's property, less frequently admitted where the question turns on the execution of a power; or the disposal of that which was the testator's property only in a qualified sense; than when the property was his own absolutely.

(i) *Lewis v. Llewellyn*, 1 *Curry*, 1 *Swanet*. 72. *Turn. & Russ.* 107; *Jones v.*

Such evidence may be requisite, to determine what the testator intended to give when he has inaccurately expressed himself:

instances in the case of loosely worded legacies of stock.

tator's property may, here also, be necessary. Parol evidence of the state of a testator's property may also be properly admitted, when it is clear the testator intended to give something, but his description is so inaccurate, that, unless a Court can travel from what he has said to something else, the intention must be entirely disappointed. Thus, where stock is bequeathed by an improper denomination, evidence may be let in to correct the mistake (*k*). In such cases, the will is plain, indeed, on the face of it, but, if it can be proved the testator acted upon the idea, that, he had the stock he bequeathed, a *latent* ambiguity exists, which, as we have seen, is a proper subject for parol evidence. The distinction is this, if the testator had possessed the stock at the time he made his will, and had given it specifically, any act of his destroying that subject would be proof of *animus revocandi*; but if the mention of stock be introduced only by way of denomination, not as a gift of the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified (*l*). However, when a testator gives a sum of stock described as "standing in his name," and he neither has the stock described standing in his own name, or in trust for him (*m*), nor any other

(*k*) *Hewson v. Reed*, 5 Mad. see, *ante*, p. 316.

451; *Penticost v. Ley*, 2 Jac.

& Walk, 211; *Dobson v. Wa-*

terman, 3 Ves. 308, n; *Door*

v. Geary, 2 Ves. Senr. 256;

Gallini v. Noble, 3 Meriv. 692:

(*l*) *Selwood v. Mildmay*, 3 Ves. 310.

(*m*) *Hewson v. Reed*, 5 Mad. 451.

other stock, the legacy must fail (*n*): but a mistake as to the correspondent amount of the stock and of the legacy given, may be a fit subject for a reference to the Master (*o*).

As a general rule, if a legacy be given to two or more, equally to be divided between them, or, to the survivor or survivors of them; and there be no special intent discoverable in the will (*p*); the survivorship is to be referred to the period of division (*q*). That period will not depend upon any technical words, but on the apparent intention of the testator, collected either from the particular disposition, or the general context of the will (*r*). If there be no previous interest given in the legacy, then, the ordinary period of division is the death of the testator; and the survivors at his death will take the whole legacy (*s*). But, if a previous life estate be given, then, the period of division is the death of the tenant for life, and the survivors at that time take the whole (*t*). If an immediate devise, "to all children and grandchildren" of the testator, or of another person, be made in terms which vest the property in possession upon his death; none but those *in esse* at that time can take, for the fund is then distributable; and consequently

The period at which survivorship is to take place, will not be governed by technical words; if a clear intention can be collected from the whole will.

Under a bequest to a class of legatees, no individuals who are not *in esse* when the fund is distributable can take:

(*n*) *Evans v. Tripp*, 6 Mad. 91.

(*o*) *Alford v. Green*, 5 Mad. 95.

(*p*) *Russell v. Long*, 4 Ves. 555; *Elwin v. Elwin*, 8 Ves. 555.

(*q*) *Cripps v. Wolcott*, 4 Mad. 15.

(*r*) *Newton v. Ayscough*, 19 Ves. 536.

(*s*) *Stringer v. Phillips*, 1 Eq. Ca. Ab. 293; *Shergold v. Boone*, 13 Ves. 375.

(*t*) *Daniell v. Daniell*, 6 Ves. 300; *Jenour v. Jenour*, 10 Ves. 566; *Bronne v. Lord Kenyon*, 3 Mad. 416.

any after-born children, or grandchildren, are excluded. But, although the devise be immediate, yet, if the vesting be postponed, so that no immediate distribution need take place; all who answer the description, not at the death of the testator, but those born afterwards, and before the fund is to vest in possession, will take (*u*). Notwithstanding this disposition, however, on the part of Courts of Equity, to include all the children of a family, where it is probable that all were equally within the intention of the testator (*w*); still the rule of exclusion, (which, though it has been “wondered” at, and termed an “artificial” one (*x*), is founded on strong necessity,) must prevail, when a distribution is to take place, before those who might otherwise be entitled, come *in esse* (*y*). When, under a devise, children take in their own rights, they take *per capita* (*z*); when by representation, and in right of their parents, they take *per stirpes* (*a*).

but, though the devise be immediate, if the vesting in possession be postponed, those born before the time of distribution will take a share.

When children take *per capita*; and when *per stirpes*.

When a future legacy is given, excluding the individual holding a certain char-

In all cases of future legacies, where the individual holding a certain character is to be excluded, the Court (unless the terms of the will expressly

(*u*) *Crone v. O'Dell*, 1 Ball & Beat. 483; *Walker v. Shore*, 15 Ves. 125; *Stanley v. Wise*, 1 Cox, 433; *Scott v. Harwood*, 5 Mad. 335; *Singleton v. Gilbert*, 1 Cox, 72.

(*w*) *Whilbread v. St. John*, 10 Ves. 154; *Hutcheson v. Jones*, 2 Mad. 129.

(*x*) *Leake v. Robinson*, 2 Meriv. 383; *Andrens v. Par-tington*, 3 Br. 404.

(*y*) *Gilbert v. Boorman*, 11

Ves. 238; *Defflis v. Goldschmidt*, 19 Ves. 570; *Jee v. Audley*, 1 Cox, 324; *Davidson v. Dallas*, 14 Ves. 578.

(*z*) *Lady Lincoln v. Pelham*, 10 Ves. 176; *Blackler v. Webb*, 2 P. Wms. 384; *Northey v. Strange*, 1 P. Wms. 342.

(*a*) *Rowland v. Gorsuch*, 2 Cox, 189; *Wythe v. Thruston*, Ambl. 556, and stated from Reg. Lib. in *Davenport v. Hanbury*, 3 Ves. 259.

ly shut out that construction,) consider, that, the party who answers the description at the time of distribution, was the intended object of exclusion; and not the person to whom the description would have applied at the date of the will, or at the testator's decease. Thus, if a legacy be given amongst the children of a family, excluding the heir; a child who at the date of the will was a second son, but who previously to the division of the fund has become the heir, will be excluded (*b*). And, in order to answer the intent, the words "younger children" have been construed with such latitude, (when the bequest has been made by a parent,) as to let in an eldest daughter, whose brother, though younger than herself, took the family inheritance; and to shut out that younger brother, as being the heir (*c*). But, under a devise to a man for life, with remainder to his third, fourth, and other sons successively, except the first or eldest son, this remainder is *contingent* only until the first devisee has two sons born, both living; when that happens, the remainder becomes *vested* in the second son, to take effect in possession upon his father's death; and will not be divested in consequence of his becoming, before his father's death, the eldest or only surviving son; unless the will afford a plain indication, that, such was the testator's intent (*d*).

acter; at what time it is to be determined who is the object of exclusion.

Construction of the words "younger children."

An estate in remainder, vested in a second son, not divested by his becoming the eldest surviving son, before the estate comes into possession.

Where

- (*b*) *Matthews v. Paul*, 3 Vern. 530.
Swanst. 339; *S. C.* 2 Wils. Ch. Ca. 77; *Bowles v. Bowles*, 10 Ves. 182; *Lady Lincoln v. Pelham*, 10 Ves. 174; *Lord Teynham v. Webb*, 2 Ves. Sen. 210; *Chadwick v. Doleman*, 2
- (*c*) *Beale v. Beale*, 1 P. Wms. 244; *Bretton v. Bretton*, 2 Freem. 158; *Heneage v. Hunloke*, 2 Atk. 455; *Hall v. Hower*, Ambl. 204.
- (*d*) *Driver v. Frank*, 6 Price,

A conversion "out and out," excludes the heir; but not so when the conversion of real estate is directed only for a particular purpose, which fails; or does not exhaust the produce.

And the resulting trust will be taken by the heir as realty, though the conversion has been made:

Where a testator has directed, what is termed, a conversion "out and out," that is, that his real estate shall at all events be sold, and converted into personalty, and has made a complete disposition of the same, the claims of the heir at law are, of course, excluded (*e*); but where such conversion is only directed with reference to a particular purpose, which fails altogether (*f*), or in part (*g*); or which does not exhaust the produce of the real estate directed to be sold (*h*); there will, in all these cases, be a total, or a partial, resulting trust in favor of the heir at law (*i*): and, although the estate has been converted, the whole, or the remaining, produce of that conversion will still, with respect to the heir, be considered as realty, not personalty (*k*): and, of course, would go to his representative according to the quality of the property he would himself have taken (*l*); unless he has done some act, or demonstrated some intention, after he acquired the possession, impressing it

75; *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 116.

(*e*) *Mallabar v. Mallabar*, Ca. temp. Talb. 80; *Durour v. Motteux*, 1 Ves. Senr. 322; *Kennell v. Abbot*, 4 Ves. 810; *Lomes v. Hackward*, 18 Ves. 171.

(*f*) *Hooper v. Goodwin*, 18 Ves. 166; *Tregonnell v. Sydenham*, 3 Dow, 210; *Jones v. Mitchell*, 1 Sim. & Stu. 294.

(*g*) *Ackroyd v. Smithson*, 1 Br. 518; *Smith v. Claxton*, 4

Mad. 492.

(*h*) *Maughan v. Mason*, 1 Ves. & Bea. 416; *Ashby v. Palmer*, 1 Meriv. 301.

(*i*) *Gibbs v. Ougier*, 12 Ves. 416; *Collins v. Wakefield*, 2 Ves. Junr. 687.

(*k*) *Hill v. Cock*, 1 Ves. & Bea. 175; *Currie v. Pye*, 17 Ves. 467; *Lomes v. Hackward*, 18 Ves. 171; *Ackroyd v. Smithson*, 1 Br. 514.

(*l*) *Walter v. Maunde*, 19 Ves. 428; *Smith v. Claxton*, 4 Mad. 493.

it with a different character (*m*). But, where a disposition by will has been made to trustees, with a power given to them to convert, or forbear to convert, the real estate devised, and to distribute the same as they should think proper; if, in consequence of their death after having made a partial conversion, a Court of Equity be called on to make the distribution, the heir at law and the next of kin (as there is no equity in favor of either) must take the fund as they find it: the real estate, unconverted, will remain real; and whatever has been converted into personal estate, in the due execution of the trust, must be taken as personal (*n*). The Court will not act for the mere purpose of converting one species of property into another (*o*). It should be observed, however, that, when real estate is devised in trust for one who is a stranger in blood to the testator; and the devise directs a conversion of the property, not merely for the purpose of meeting particular occasions, but, out and out; there, if the residuary legatee (being the *cestui que trust*) take the property *in statu quo*, the real estate must still be considered, in Equity, for many purposes, as sold, although the trustees have not actually converted it into money: it will be liable to legacy duty as personalty; and if the residuary legatee had died before election, it would have gone to his personal representatives (*p*).

But, where an optional power of conversion is given to trustees, and not completely executed by them;

the heir at law and the next of kin must take the property as they find it:

A stranger in blood, who takes an estate directed to be converted out and out, takes it as personalty, though it be not converted.

Where

(*m*) *Biddulph v. Biddulph*, 12 Ves. 165; *Kirkman v. Miles*, 13 Ves. 339.

(*n*) *Walter v. Maunde*, 19 Ves. 427, 429.

(*o*) *Croft v. Slee*, 4 Ves. 65; *Walker v. Denne*, 2 Ves. Junr. 185.

(*p*) *Attorney General v. Holford*, 1 Price, 433.

Distinction between a devise charged with the testator's debts; and a devise on trust to pay such debts:

Where a testator gives his real estate to *A.* and his heirs, *charged with* his (the testator's) debts; that is a devise for a particular purpose, but not for that purpose only. If the devise be, *on trust to pay* the testator's debts; that is a devise for a particular purpose, and nothing more. The wide difference of effect is this;—the first mode is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose: the latter, is a devise for a particular purpose, with no intention to give him any beneficial interest. When, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not exhaust the whole; so much of the beneficial interest as is not exhausted belongs to the heir: but, where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole be not exhausted by the particular purpose; the surplus goes to the devisee, as it was intended to be given to him (*q*). The construction is different, when personal estate is given to executors “subject to and chargeable with” legacies; under such a bequest the executors take no beneficial interest; but are trustees of whatever surplus may remain (*r*). Where a testator, after directing his debts to be paid, names certain persons as “trustees of inheritance” for the execution of his will; they are trustees of his real estate, for payment, not only of debts, but, of legacies (*s*).

Where

Executors, under a bequest of personalty “subject to” legacies, are merely trustees.

(*q*) *King v. Denison*, 1 Ves. & Bea. 272.

(*r*) *S. C.* p. 278.

(*s*) *Trent v. Hanning*, 10

Where part of the real estate of a testator, or intestate, is, at the time of his death, subject to a covenant to convey the inheritance in the same to the tenant thereof, in case of his electing to take it at a certain price; until such election is made, the rent belongs to the heir, or devisee; but the purchase money, when the election is declared, will be considered as personal estate of the testator, or intestate; and, as such, will go to his legatees, or next of kin (*t*).

Interests of the several classes of representatives, where a testator's estate is subject to a conditional covenant to convey the same.

The statute (*u*) in restraint of directions by will for accumulations of property, for a longer period than twenty-one years; or during the minority or respective minorities of any person or persons who, under the uses or trusts of the will directing such accumulation would, for the time being, if of full age, be entitled unto the annual produce so directed to be accumulated; contains an exception as to provisions for payment of debts, or for raising portions. Therefore, when an estate is given to trustees to pay debts, and then to a person designated, the statute does not apply; the payment of the testator's debts may exhaust the produce of the estate for a longer or a shorter time, but the person designated takes at once, subject to the debts. The estate vests, and the property is not tied up; though a fund is provided thereout for some specific charges (*x*). It is to be observed, that, the

The statute in restraint of accumulations, contains an exception as to provisions for payment of debts;

or for raising portions.

Trusts which go beyond the statute

Ves. 499; *S. C.* 7 East, 105: 15, 1805.

and, on appeal, 1 Dow, 102.

(*u*) Stat. 39 & 40 Geo. 3, c.

(*t*) *Townly v. Bedwell*, 14 98.

Ves. 506, citing *Lames v. Bennett*, decided at the Rolls, Feb.

(*x*) *Bacon v. Proctor*, 1 Turn. & Russ. 40.

prescribed limits
are void for the
excess only.

statute last cited was intended only to guard against the inconvenience of locking up property, for a longer period than twenty-one years: whenever an accumulation for a longer term is directed, the policy of the act is sufficiently complied with, by declaring the trust void for the excess, only (y). But, if a trust for accumulation would have been bad independently of the statute, it is not made good by the statute (z).

The natural conclusion is, that a person who has made a will intended to die completely testate:

It is the most natural construction, that, a person who has left a will intended to die completely testate; a Court of Equity, therefore, will not be disposed to impute intestacy, in consequence of events, the contingency of which could not have escaped the devisors notice, if his words can, by aid of any fair presumption, be held sufficient to extend to that contingency (a). And, with respect to personal estate, it is generally inferred, that, a testator who gives all his property, meant to give, not only all he had at the time of making his will, but, all that he might have at the time of his death. It is true, indeed, that the gift of a residue may be so worded as to have a limited operation; but very special words are required to take a bequest of a residue out of the general rule (b). If a general residuary

Very special words required to confine a gift of a residue to a limited operation.

(y) *Longdon v. Simpson*, 12 Ves. 298; *Griffiths v. Vere*, 9 Ves. 131; *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 61.

(z) *Marshall v. Holloway*, 2 Swanst. 450.

(a) *Whittell v. Dudin*, 2 Jac. & Walk. 283; *Bird v. Huns-*

don, 2 Swanst. 345; *Booth v. Booth*, 4 Ves. 403; *Crooke v. De Vandes*, 9 Ves. 106; *Phillips v. Chamberlaine*, 4 Ves. 59.

(b) *Bland v. Lamb*, 2 Jac. & Walk. 405; *Page v. Leapingwell*, 18 Ves. 466; *Attorney General v. Johnstone*, Ambl.

residuary clause profess to give every thing "not specifically disposed" of by the will, the testator will be understood to have meant every thing not *particularly* disposed of: it would be too technical and artificial a construction to hold, that, he meant, in case of a lapse, to die intestate with regard to all sums specifically bequeathed, and testate as to all general pecuniary legacies: if, therefore, under such a will a legacy, specifically given, should lapse, it will be looked upon as comprehended in the general residuary bequest (c). The case would be different as to an annuity charged on lands; if that lapsed, or was void in its creation as being contrary to the policy of the Law, it would sink, either for the benefit of the specific devisees of the estate on which it was charged (d); or, of the heir at law (e), if the charge was severed from the devise.

A lapsed legacy goes to the general residuary legatee:

but a lapsed, or void, annuity charged on lands, sinks for the benefit of the real estate.

It must be a very peculiar case, in which there can at once be a residuary clause and a partial intestacy as to the testator's personalty; unless some part of the disposition of the residue itself fail (f): to the extent of such failure, the will must be inoperative. In the instance of a residue given in moieties, to hold that one moiety, lapsing, should accrue to the other, would be to hold that a gift of a moiety of a residue should eventually carry the whole (g). With this exception, a residuary le-

Where part of the disposition of the residue fails, to that extent the will must be inoperative:

but, generally, a residuary legatee

579; *Davers v. Dewes*, 3 P. Wms. 42.

(e) *Tregonwell v. Sydenham*, 3 Dow, 208.

(c) *Roberts v. Cooke*, 16 Ves. 453; *Crooke v. De Vandes*, 11 Ves. 332.

(f) *Leake v. Robinson*, 2 Meriv. 393.

(d) *Baker v. Hall*, 12 Ves. 500.

(g) *Skrymsher v. Northcote*, 1 Swanst. 571.

tee takes all lapsed personality; though a residuary devisee does not take a lapsed devise.

Force of the epithet "residuary" when used as to executors.

What passes under a bequest of the testator's house, "and all that should be in it," at the testator's death.

Quare, as to bank notes.

gatee takes every thing personal that lapses (*h*); although, by a distinction, in favor of the heir at law, which is well settled, a residuary devisee does not take a lapsed devise (*i*). Of course, executors, as such, can have nothing to do with their testator's real property (*k*); and the epithet "residuary" added to their description could only avail them in a question with the next of kin (*l*).

Lord Hardwicke repeatedly decided, that, under a bequest of the testator's house "and all that should be in it" at the testator's death; cash passed, and bank notes, which, his Lordship held, were to be considered as cash (*m*); but not promissory notes and securities, as they are evidence of title to things out of the house, and not things in it. Lord Thurlow (*n*), Lord Redesdale (*o*), and Richards, C. B. (*p*), have referred to these decisions, and treated them as binding authorities; but Lord Eldon has intimated, that, bank notes came, within precisely the same consideration as other securities

(*h*) See, however, *post*, that a general residuary clause is not equivalent to a devise over of bequests upon condition.

(*i*) *Dawson v. Clark*, 15 Ves. 415; *Cambridge v. Rous*, 8 Ves. 25; *Gravenor v. Hallam*, Ambl. 645; *Attorney General v. Johnstone*, Ambl. 580; *Jones v. Mitchell*, 1 Sim. & Stu. 294.

(*k*) *Dawson v. Clark*, on appeal, 18 Ves. 253; *Trent v. Hanning*, 10 Ves. 499.

(*l*) *Berry v. Usher*, 11 Ves. 92.

(*m*) *Southcote v. Watson*, 3 Atk. 232; *Popham v. Lady Aylesbury*, Ambl. 68; *Chapman v. Hart*, 1 Ves. Senr. 273.

(*n*) *Moore v. Moore*, 1 Br. 129.

(*o*) *Fleming v. Brook*, 1 Sch. & Lef. 319.

(*p*) *The King v. Capper*, 5 Price, 265: and see Lord Mansfield's judgment in *Miller v. Race*, 1 Burr. 457.

rities and *choses en action*: no decision upon the subject was, however, then called for (*q*).

With respect, however, to real estate, a devise of all a testator's "property," or, "all he is worth," if unqualified by the context (*r*), will pass the fee; —the whole legal and equitable estate (*s*). And the word "estate," in a will, carries the whole real as well as personal estate, unless a contrary intention on the part of the testator appear, inducing a Court to put upon that word a less extensive signification than it naturally bears (*t*). Even when the word is used in a clause containing an enumeration of the testator's personal estate, it *may*, nevertheless, include his real estate; if, upon the whole will, this can be inferred as the probable intention (*u*): but, in such cases, the meaning of the word "estate," like that of the word "effects," will, in general, be confined to estate or effects *ejusdem generis* with those enumerated; as being the most natural construction, when unexplained by the context (*x*). Though the word "effects," when used *simpliciter*, will be sufficient to

A devise of all a testator's "property," or of "all he is worth;" if unqualified, will pass a fee: and the word "estate," in a will, *may* include the whole estate both real and personal; though contained in a clause enumerating personal items.

(*q*) *Stuart v. Marquis of Bute*, 11 Ves. 662.

(*r*) *Doe v. Hurrell*, 5 Barn. & Ald. 21; *Roe v. Yeud*, 2 New Rep. 221; *Doe v. Rout*, 2 Marsh. 400.

(*s*) *Nicholls v. Butcher*, 18 Ves. 195; *Huxtep v. Brooman*, 1 Br. 437; *Roe v. Pattison*, 16 East, 222; *Noel v. Hoy*, 6 Mad. 39.

(*t*) *Barnes v. Patch*, 8 Ves. 608; *Chorlton v. Taylor*, 3

Ves. & Bea. 163; *Pettinard v. Prescott*, 7 Ves. 545; *Fletcher v. Smiton*, 2 T. R. 659; *Roe v. Wright*, 7 East, 267.

(*u*) *Woollam v. Kenworthy*, 9 Ves. 144: the like holds as to the word "property," *Doe v. Langlands*, 14 East, 373.

(*x*) *Rawlings v. Jennings*, 13 Ves. 46; *Hotham v. Sutton*, 15 Ves. 326; *Stuart v. Lord Bute*, 11 Ves. 666.

When a testator has given "all his estate whatsoever," a subsequent imperfect enumeration of the particulars will not limit the bequest.

A mistaken description of the subject of gift, or an error in computation, will not defeat a bequest.

Under a devise of a testator's leasehold messuages, his mortgage interest in such premises may pass:

to convey a gift of the whole personal estate (*y*).

When a testator has made a general disposition of "all his estate whatsoever," a subsequent enumeration of the articles of which he supposes his estate to consist, will not limit his bequest to the particulars specified: he will be understood as intending to give all he could, though his statement of what he had was imperfect (*z*): this construction is by no means inconsistent with the rule which holds, that, to control the operative and effective part of a clause, by ambiguous words occurring in the introductory part of it, would be inadmissible (*a*). It is a maxim, adopted by our own Courts of Equity from the civil code, *falsâ demonstratione legatum non perimi* (*b*); and, as a mistaken description of the subject of gift will not invalidate a legacy, where the intent is clear (*c*); so, a mistake in computation will be rectified (*d*).

If a mortgagee of leasehold premises devise "his leasehold messuages;" although this description be not strictly applicable to premises on which he had a mortgage, yet, if it can be collected from the will, that, he intended by these words to give whatever interest he might have in such premises, that interest will pass under the improper denomination. The same construction would be made, even if a residuary clause of the same will contained

(*y*) *Michell v. Michell*, 5 Mad, 71; *Campbell v. Prescott*, 15 Ves. 507.

(*z*) *Chalmers v. Storil*, 2 Ves. & Bea. 223.

(*a*) *Earl of Orford v. Churchill*, 3 Ves. & Bea. 67.

(*b*) *Whitfield v. Clement*, 1 Meriv. 404.

(*c*) *Clarke v. Guise*, 2 Ves. Senr. 618.

(*d*) *Milner v. Milner*, 1 Ves. Senr. 107; *Danvers v. Manning*, 2 Br. 22.

tained a clause disposing of all *other* (or even, it seems, of *all*) the testator's mortgage estates and interests. This construction would be the more admissible, if the testator had other mortgages besides the leasehold premises; so that the residuary clause would not remain inoperative, although these premises should not be comprehended in it (*e*). There is nothing in this contradictory to the decision, that, a mortgage for a term of years will not pass under a devise of the mortgagee's lands, tenements, and real estates; more especially when he has, by another clause of his will, disposed of his mortgages, and when he had only chattel interests of that description (*f*). Where a testator devises lands which have become his own, absolutely, by foreclosure; though he may inaccurately use such terms as would, more properly, be descriptive of a mortgage interest only; yet, if it appear to have been his intent not to give the money merely, as a charge upon the land, but the land itself, the whole estate will pass (*g*).

But a chattel mortgage interest will not, usually, pass under a devise of real estate:

though words descriptive of a mortgage interest, may pass the lands themselves.

A general devise will, commonly, pass an estate held in trust, or mortgage; unless from the words of the will, or from a disposition of the property inconsistent with the limited nature of the deviser's right, it can be collected, that, he did not mean such estate to pass (*h*). For instance, it is quite

A general devise will pass estates held in trust, or mortgage, unless a different intent appear:

(*e*) *Woodhouse v. Meredith*, 1 Meriv. 456: see, *ante*, p. 313, as to mortgages of freehold.

Ves. & Bea. 50.

(*f*) *Davis v. Gibbs*, 3 P. Wms. 28.

(*h*) *Lord Braybroke v. Inskip*, 8 Ves. 433, 435; *Ex parte Morgan*, 10 Ves. 103; *Ex parte Brettell*, 6 Ves. 578.

(*g*) *Silberschildt v. Schiott*, 3

which may be collected from the purpose to be answered by the devise:

Distinction to be made, however, between a mere trustee, and a constructive trustee; the several wills of which parties may require, as to this point, a very different exposition.

quite clear, that, a testator cannot subject an estate holden by him merely in trust to the payment of his own debts: if, therefore, a testator, by general words, give "all his estates, after payment of his debts," these words would afford a *prima facie* inference, that, he only meant to give that in which he had a beneficial interest, and which he had a power of charging with payment of his own debts (i). So, if a testator devise "all his estates," adding a direction that they should be *sold*; this direction would be quite incompatible with an intention to give an estate, which he held as a naked trustee. But, the analogy between the will of a naked trustee, and that of a constructive trustee, must not be pushed too far. A mere trustee is a person who, not only has no beneficial ownership in the property, but, never had any. In that respect, he does not resemble one who has agreed to sell an estate, which up to the time of the contract was his own. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. The purchaser is not bound till the title is made out, and it may be uncertain whether the contract can be completed: it would be unreasonable to hold, that, in such a state of things, a general devise of the vendor's estates would not carry an estate so circumstanced. This would be pursuing the fiction of Equity,—that, an agreement entered into is to be considered as performed

(i) *Roe v. Reade*, 8 T. R. 122.

performed,—to practical consequences which the framers of the principle never contemplated. If, in the case put, the contract failed, the beneficial ownership would be undisposed of, unless the will were allowed to have effect. If the contract were performed, no injury could arise from that construction; the only difference would be, that, the devisees would have to convey, instead of the heir: but, by the other construction, a positive injustice would be done, if the contract were not performed; for the estate would go to the heir, contrary to the intent of the testator (*k*).

The distinction between an equitable *estate*, and an equitable *right* to have a conveyance of the legal estate (*l*); and, also, between the situation, and rights, of a naked trustee, and a constructive trustee (*m*); is fully recognized even by Courts of common Law, as far as those Courts are competent to deal with such questions. Still, an heir at law will never be disinherited without an express demonstration, that, such was the testator's intent (*n*): although the words of a will, therefore, may be sufficient to make the deviser's real estate pass to his trustees; yet, if the devise to such trustees be upon trusts applicable only to personal property, the real estate will, indeed, pass to the trustees,

But, though this distinction is recognized;

still an heir at law will not be disinherited without express demonstration of such an intent.

(*k*) *Ball v. Wright*, 1 Jac. & Walk. 501, 504: see, also, *Bubb's case*, 2 Freem. 38.

(*l*) *The King v. Inhabitants of Soddington*, 1 Barn. & Ald. 505.

(*m*) *The King v. Inhabitants*

of Geddington, 2 Barn. & Cressw. 134.

(*n*) *Kellett v. Kellett*, 3 Dow, 254; *Tregonwell v. Sydenham*, 3 Dow, 209; *Upton v. Lord Ferrers*, 5 Ves. 801.

tees, but it will be subject to a resulting trust in favor of the heir at law (*o*).

The heir, or devisee, may have a purchase, contracted for by the aucestor, or deviser, completed, and paid for out of the personal assets.

An estate which a testator has contracted for, passes, as we have seen, under his will devising his real estate; or descends to his heir, if no valid will exist: and, in either case, the heir, or devisee, may insist on having the purchase completed out of the testator's personal assets. This doctrine, however, must be received with one special qualification, namely, that, the title to the estate contracted for turns out to be good; if it prove so defective that the testator himself could not have been *compelled* to take it; the heir, or devisee, will not be allowed to wave the defect, and call on the personal representatives to pay the purchase money; nor can they insist on having the price employed in the acquisition of another estate (*p*).

When an absolute bequest is accompanied by a gift over, upon an event which is, at some time or other, inevitable; the context may enable a Court to limit the contingency to its occurrence within a certain time.

When an absolute bequest is accompanied by a gift over, upon the occurrence of an event which, from its nature, is, at some period or other, inevitable—as death, for instance,—if the words imply contingency, it may be necessary to understand them as referring to the occurrence of the specified event under particular circumstances, or within a certain time. The introduction of that qualification, if justified by any sufficient indications to be collected from the context of the will, may enable a Court to reconcile, and render sensible, the whole of the dispositions (*q*): but, on the other hand,

(*o*) *Dunnage v. White*, 1 Jac. & Walk. 585.

Ves. 607, 612; *Rose v. Conynghame*, 11 *Ves.* 555.

(*p*) *Broome v. Monck*, 10

(*q*) *Billings v. Sandom*, 1

hand, it would be inadmissible, to cut down what purported to be an absolute gift into a gift for life, by introducing a qualification not necessary to render the whole will consistent (r).

A Court of Equity will never fetter personal property, by adjudging it to be held as an heir-loom, upon presumption; more especially in the case of a testator who, when such was his intention, knew how to express it. A claim which, in effect, attempts to restrain alienation, and permanently to give to personalty the character of annexation to realty, can only be enforced on clear proof; not by doubts on the construction of a will (s).

No construction, it seems, in aid of the creation of heir-looms;

Still, where a testator has directed, that, certain personal chattels shall go as heir-looms; though the limitation may not have been made in such terms as the Law, in a strict sense, requires for settling heir-looms; Lord Hardwicke seems to have held, that, a Court of Equity should be disposed to give effect to the clear intent, as far as it can be made consistent with the rules of Law (t). How-

though Lord Hardwicke looked on such limitations more indulgently.

ever

Br. 394; *Trutter v. Williams*, Prec. in Cha. 78; *Galland v. Leonard*, 1 Swanst. 164; *Cambridge v. Rous*, 8 Ves. 21; *King v. Taylor*, 5 Ves. 810; *Webster v. Hale*, 8 Ves. 413; *Harvey v. M'Lauchlin*, 1 Price, 271.

(r) *Whittel v. Dudin*, 2 Jac. & Walk. 286; *Ommaney v. Bevan*, 18 Ves. 291; *Slade v. Milner*, 4 Mad. 147; *Lord Douglas v. Chalmer*, 2 Ves.

Junr. 505; *Hinchley v. Simmons*, 4 Ves. 163; *Webster v. Hale*, *ubi supra*.

(s) *Savile v. Lord Scarborough*, 1 Swanst. 546; *Boon v. Cornforth*, 2 Ves. Senr. 280; *Wythe v. Blackman*, 1 Ves. Senr. 202.

(t) *Gomer v. Grosvenor, Barnard*, 56, 63; *S. C.* 5 Mad. 338, 349; *Trafford v. Trafford*, 3 Atk. 349.

Heir-looms vest absolutely in the first tenant in tail.

ever this may be, modern decisions have settled; that, the absolute interest, in chattels so given, vests in the first tenant in tail who comes *in esse* (u). And Lord Hardwicke himself admitted, that, the case of *Leveson v. Gower* went to the utmost allowable extent in favor of heir-looms (x). But, where a personal chattel has been well limited as an heir-loom, a bill in Equity will hold for a specific delivery thereof to the party entitled to the possession (y).

Bill lies for delivery of an heir-loom.

A child *en ventre sa mere* will share in a gift to children born in the lifetime of the testator.

It is now fully settled, that, a child *en ventre sa mere* is within the intention of a gift to children living at the death of the testator (z); and it follows, that, a child *en ventre sa mere* is to be considered within the intention of a gift to children born in the lifetime of the testator, such child being as plainly within the motive and reason of the gift (a).

Trustees for sale of estates ought not, generally, to grant leases.

Where an estate has been devised to be sold, it would, in general, be improper in the trustees to grant leases of such estate, which, in most cases, would be likely to prejudice the sale; but, if there be mines under the lands devised, and it appear, on a reference to the Master, that, it would be beneficial to the parties interested in the proceeds of

(u) *Foley v. Burnell*, 1 Br. 285; *Vaughan v. Burslem*, 3 Br. 106; *Carr v. Lord Erroll*, 14 Ves. 487.

(x) *Duke of Bridgewater v. Egerton*, 2 Ves. Senr. 122.

(y) *Earl of Macclesfield v.*

Davis, 3 Ves. & Bea. 18.

(z) *Thelluson v. Woodford*, 4 Ves. 334: Stat. 10 & 11 Wil. 3, cap. 16.

(a) *Trower v. Butts*, 1 Sim. & Stu. 184.

of the sale, that, leases of the mines should be previously granted, as auxiliary to such sale, an order to that effect may be obtained (*b*).

If a testator make a general bequest of leasehold property, upon condition, that, the legatee should assign a certain leasehold estate, part of that property, to a charitable purpose; such a condition being illegal, the legatee will retain the whole leasehold property, discharged of the condition, and will not be considered as a trustee for the next of kin with respect to the void bequest to the charity (*c*).

If a legacy be coupled with an illegal condition, the condition is void, and the bequest absolute.

Words of request (*d*), recommendation (*e*), or confidence (*f*), are sufficient to raise a trust, where the property to be given is certain, and the objects to whom it is to be given are also certain (*g*): but, when either the objects, or the nature and *quantum* of the subjects, are indefinite; this, in the consideration of Courts of Equity, is used as evidence, that, the mind of the testator was not to create a trust (*h*). And, whether such were the intention, or not, it would be impossible for a Court to execute a trust, the extent of which is not described with certainty: thus, where a testator,

When words of request, recommendation, or confidence, raise a trust; and when not.

No ulterior trust can attach upon an absolute legacy, when the first taker may, during his lifetime, dispose of the whole at his pleasure:

(*b*) *Jervoise v. Clerk*, 6 Mad. 96. Ves. Junr. 335.

(*c*) *Poor v. Mial*, 6 Mad. 32. Ves. 476; *Wright v. Atkyns*, on appeal, Cooper, 115.

(*d*) *Taylor v. George*, 2 Ves. & Bea. 378; *Pierson v. Garnet*, 2 Br. 226. (*g*) *Pierson v. Garnet*, 2 Br. 45; *Crunys v. Coleman*, 9 Ves. 323.

(*e*) *Paul v. Compton*, 8 Ves. 380; *Pushman v. Filliter*, 3 Ves. 8; *Malim v. Keighley*, 2 (*h*) *Morice v. Bishop of Durham*, 10 Ves. 536.

by will, gives his property in terms which vest the absolute property in his legatee, the bequest will not be cut down by a subsequent clause, requesting, that, such part of the property as may be remaining at the death of the first legatee, should go over to another designated object: the first legatee being at liberty to deal with the property at his pleasure, during his lifetime, there is no certain or ascertained part on which a trust can attach (i).

Where property is given absolutely in other respects, a proviso, that, if the legatee do not spend it, his interest shall cease at his death, is void:

When property is given to a person absolutely in other respects, it cannot be subjected to a proviso, that, if he do not spend it, his interest shall cease at his death: this would be an attempt to separate the devolution of property from the property itself; and one fraudulent consequence would be, that, if he had not spent it, and were to die indebted to any amount, his creditors, who may have become such in reliance on his absolute property, would be excluded from it (k). Yet, where the bequest to the first legatee is not absolute, but expressly for life only; there, it seems, though it be accompanied with a power to sell and dispose of the same as the legatee may think proper, during his lifetime; a bequest over, of what shall happen not to have been appropriated, may be well limited (l): though, it is obvious, that the consequence pointed out by the authority before cited, may attach upon such a limitation.

but, if the gift to the first legatee be expressly for life, (though he may dispose of the whole) the rule seems different.

Some

(i) *Eade v. Eade*, 5 Mad. 13 Ves. 451.

121; *Curtis v. Rippon*, 5 Mad.

434; *Bland v. Bland*, 2 Cox,

355; *Bull v. Kingston*, 1 Mer.

320; *Pushman v. Filliter*, 3

Ves. 9; *Bradley v. Westcott*,

(k) *Ross v. Ross*, 1 Jac. & Walk. 158.

(l) *Surman v. Surman*, 5 Mad. 124.

Some Judges have held, that, where a limited use of "live and dead stock," or similar articles, is given, with remainder over, the articles must be sold; and, that, the person entitled to the limited use is to have only the interest of the money: but, Lord Alvanley thought this too rigid a construction (*m*). In these cases, the use of the property must, generally, be much more beneficial to the first taker, than the interest of the sum produced by their sale. Unless, however, the words of bequest clearly embrace property of that description; it will be thought the most natural construction, that, the testator did not intend to include articles which are consumed by their very use, when he has limited the interest of the first taker to a life estate (*n*): since, in point of fact, it would be scarcely possible to say, that, a specific gift, for life, of articles the use of which consists in the consumption, is not a gift of the property; for the use and the property can have no separate existence. There can be no secure limitation over, after a life interest in such articles (*o*).

Articles which are consumed by their very use;

not included, without express words, when a life interest only is given to the first taker:

since a gift for life of such articles, almost amounts to a gift of the property.

Where a father has covenanted to make an equal division, at his death, of all the property he should die possessed of, between his two daughters; though he retains a free power of disposition during his life, by expenditure even the most improvident, or by gift, if absolute,—against which a natural regard for his own interest would afford some

A parent may retain a power of absolute disposition in his lifetime;

(*m*) *Porter v. Tournay*, 3 Ves. 314.

(*o*) *Randall v. Russell*, 3 Meriv. 194.

(*n*) *S. C.* p. 313.

yet be tied up so as to be unable to make an unequal distribution amongst his children, by any act which is, in substance, testamentary.

A simple gift to the wife is a gift to the husband:

but Equity will execute a plainly declared trust for the sole and separate use of the wife.

some security (*p*); yet, he will not be allowed to defeat his covenant, and make an unequal division, by any distribution which is, in effect, though not in form, testamentary: as, where he makes a reversionary gift to one of the daughters, by an irrevocable instrument, reserving a life interest to himself (*q*).

In Equity, as at Law, a gift to the wife is a gift to the husband; who, being bound to maintain the wife, is entitled to her property. A Court of Equity will, however, execute a trust for the sole and separate use of the wife, when the intention of the donor to that effect is unequivocally declared; but, a gift to the wife *for her use* is no declaration of such an intention (*r*): and it is difficult to find any substantial distinction between a gift to a wife for her use, and a gift for her *own* use (*s*). But, the word “sole” is an emphatic and operative word in a will; a bequest, therefore, to the *sole* use of the wife will be tantamount to a bequest for her separate use (*t*): so, a legacy directed

(*p*) *Lewis v. Maddocks*, 17 Ves. 50; *Jones v. Martin*, 5 Ves. 266, note.

(*q*) *Fortescue v. Hennah*, 19 Ves. 71.

(*r*) *Wills v. Sayers*, 4 Mad. 411.

(*s*) *Roberts v. Spicer*, 5 Mad. 492; there is, indeed, a case of *Jones v. ———*, (cited, *arguendo*, in *Lumb v. Milnes*, 5 Ves. 520,) in which, according to the report, a different deci-

sion was made; (and that report was considered as good authority in *Adamson v. Armitage*, 19 Ves. 419;) but, Mr. Belt, by an examination of Reg. Lib. has shewn, that, the legacy in that case was held *not* to pass a separate estate to the wife. See note to *Lee v. Prieaux*, 3 Br. 383, Belt's edit.

(*t*) *Ex parte Ray*, 1 Mad. 207.

ed to be paid into the proper hands of a married woman, and that her receipt should be a sufficient discharge for the same, is a trust for her separate use (u). In one case, according to the report in Atkins, it was held, that, a devise to the husband for the "livelihood" of the wife, would convert the husband into a trustee for her separate use (x): but, Lord Alvanley, after an examination of the register's book, declared the decision and the report of that case to be directly at variance; the report, therefore, is of no authority (y). Technical words, however, are not necessary, even in a deed of settlement (z), and, *a fortiori*, not in a will, to secure property to a married woman's separate use; a Court of Equity will raise a trust to that effect, whenever it can unequivocally discover such to have been the intention of the testator: thus, where a specific bequest is made to the wife, to be delivered up to her when she should demand or require the same; as the husband could not obtain the legacy from the executors, but a demand by the wife is made necessary, this gives her such a dominion over it, as is held to afford an inference, that, the testator intended it for her separate use (a).

A gift to the husband for the "livelihood" of his wife, does not convert the husband into a trustee.

Technical words, however, are not necessary, when a bequest appears, unequivocally, intended for a married woman's separate use.

A bequest to the separate use of a married woman, unaccompanied by any qualifying restrictions, must, in Equity, carry with it the *jus disponendi*,

A bequest to a married woman's separate use, carries with it the *jus disponendi*:

as

(u) *Hartley v. Hurle*, 5 Ves. 383.
545.

(z) *Tyrrell v. Hope*, 2 Atk.

(x) *Darley v. Darley*, 3 Atk. 561.

399.

(a) *Dixon v. Olmuis*, 2 Cox,

(y) *Lee v. Prieaux*, 3 Br. 415.

unless the context shews that no such power was intended to be given.

The wife's power may be restrained, during coverture only:

this restriction may be merely a protection to her; on the same principle as a restraint of her power of alienation by anticipation;

as a necessary incident of property (b). But, there are many cases in which the question has been, whether the absolute property, including a power of disposition, was intended to be given; or, whether it was a personal gift only, without a power of disposition; and where a Court of Equity has seen, from the words of the will, an intention to limit the wife to a personal gift, without a power of disposition, the Court has said, this condition might be imposed, and an interest inconsistent with it should not take effect (c). And where it is expressly stipulated, that, the rents and interest of property shall be paid to the separate use of the wife; if this stipulation be accompanied with a provision, that, *in the event of the wife's surviving*, the property should be absolutely her's, the provision will imply an exclusion of a power so to appoint it during the coverture, as that it shall not, in such event, belong to her (d). This is a restriction upon a *feme covert's* free power of disposition, more likely, in the majority of instances, to afford her a beneficial protection, than to prejudice her; and proceeds upon the same principle as the cases which, after considerable struggle, have established, that, a wife's power of alienating property, given in trust for her separate use, may be modified, by a clause in restraint of anticipation.

(b) *Essex v. Atkins*, 14 Ves. 353: see, *ante*, p. 267.

547; *Parkes v. White*, 11 Ves. 221; *Pybus v. Smith*, 1 Ves. 524. (c) *Wagstaff v. Smith*, 9 Ves. 524.

Junr. 194; *Fettiplace v. Georges*, 1 Ves. Junr. 49; (d) *Lee v. Maggeridge*, 1 Ves. & Bea. 128.

Tappenden v. Walsh, 1 Phillim.

tion (e). So, where a *feme covert* is empowered to dispose of property, (settled, or given by will, for her separate use for her life,) by her last will and testament in writing; it is only by such a revocable instrument that she can exercise her power: an attempt to bind herself to a conclusive disposition by deed will be ineffectual (f). or, by any other than a revocable instrument.

A devise to a married woman, and to all and every the child or children of her body lawfully issuing, and unto his, her and their heirs or assigns for ever as tenants in common; if the construction be not controlled by other parts of the will, may be construed to import a life estate to the mother, and a remainder in fee to the children. In such a case, it has been considered, that, there are two gifts, one to the mother, without words of limitation superadded; and another to her children, their heirs and assigns: and, that, these latter words of limitation do not comprehend, and are inapplicable to, the mother (g). An analogous construction would be made with respect to a bequest of personalty to a woman and her children, if it appeared by the will, that, they were intended to take as her representatives; not as joint-tenants with her (h). What words of devise may be construed to give a life estate to a married woman, and a fee in remainder to her children; instead of admitting the latter to take as joint-tenants with her, immediately.

Where a testator has given a certain sum, as a debt A sum given by will in discharge

(e) *Jackson v. Hobhouse*, 2 Meriv. 487; *Brandon v. Robinson*, 18 Ves. 434; *Ritchie v. Broadbent*, 2 Jac. & Walk. 458; *Mores v. Huish*, 5 Ves. 693. 486; and see *Pybus v. Smith*, *ubi supra*.

(g) *Jefferey v. Honeymood*, 4 Mad. 403.

(h) *Crawford v. Trotter*, 4 Mad. 362.

(f) *Socket v. Wray*, 4 Br.

of a debt, is good, though the amount of the debt be mistaken: debt due to the person to whom he gives it; the circumstance that he has mistaken the amount of the debt, and that, in fact, he does not owe to that person so much as he has given, will not invalidate the bequest (i). And not only where the act is one which, in part, is no more than simple justice; but, also where the bequest is altogether one of mere bounty, the rule, adopted, (as we have seen,) from the civil Law, which declares *falsâ demonstratione legatum non perimi*, will prevail (k). *A fortiori*, therefore, a Court of Equity will never aid a construction of a will which would go to defraud creditors of payment of their just debts. Where there is a mere direction to the executors to pay the testator's debts, without giving them any other fund than the personal estate, out of which they can fulfil that duty; the Court, if the personal estate were insufficient for the discharge of the whole of the debts, would, even though the bill was not specially framed for that purpose, marshal the assets, and throw all specialty debts upon the real estate (l). And, where there are not any debts which in their nature give a *lien* upon real estate, there is no case, in which a testator has prefaced his will by a general direction for payment of his debts, where Courts of Equity have not held, that, the whole real estate, whether specifically devised or not, shall, if necessary, be applied

for Equity favors the payment of just debts:

in order to effect which, assets will be marshalled:

a general direction for payment of debts, will override every other disposition of real estate, as well as the claims of the heir at law.

(i) *Whitfield v. Clement*, 1 Meriv. 404.

(k) *Williams v. Williams*, 2 Br. 87; *Milner v. Milner*, 1 Ves. Senr. 107.

(l) *Keeling v. Brown*, 5 Ves. 361; *Gibbs v. Ougier*, 12 Ves. 416; *Powell v. Robins*, 7 Ves. 211; *Saunderson v. Wharton*, 8 Price, 682: *post*, p. 388.

applied to this honest purpose. On a different construction, the direction in the will would be nugatory; the testator could not help paying his debts out of his personal estate: if, therefore, a testator, in any part of his will, manifest an intention that his debts shall be paid, they are to be paid before any appropriation of what he has power to give; and will ride over every other disposition; and this as against either his heir at law or devisee (*m*).

There is, however, this distinction in the cases between debts and legacies. As to the former, the Courts have gone upon moral principle, and have held slight indications of an intent to do what is obviously just, sufficient. But, with respect to legacies mere implication is not sufficient; there must be a clear, manifest intention, that, the devisee should take subject to the legacies, to charge real estate therewith: the two cases, it is plain, are perfectly different, the act of the testator in one instance being purely voluntary; in the other obligatory (*n*). Yet, even with respect to legacies, where a testator, after declaring his intention to dispose of all his worldly estate, first gives several pecuniary legacies, and several annuities for lives, to be paid by his executor, and then devises all the rest and residue of his goods and chattels, and estate, to his heir at law, and makes him sole executor; the lands will pass to the

But with respect to legacies, there must be a clear intention to charge the payment thereof upon real estate.

Though, where the descent is broken, or the estate is subjected to a charge, making it equitable assets, legacies must be held a charge upon the real estate, if the personalty prove deficient.

(*m*) *Shallcross v. Finden*, 3 Ves. Junr. 330; *Shallcross v. Finden*, 3 Ves. 739; *Trotter v. Vernon*, Prec. in Cha. 439.

(*n*) *Kightley v. Kightley*, 2 Ves. 362; *Bootle v. Blundell*, 1 Meriv. 233.

the executor as such, and he will be held to take by the will, and not by descent;—(though, had he entered as heir, the legatees would have been equally entitled to relief(o); for, whether the descent be broken, or not, a charge upon real estate makes it equitable assets (p):)—and the lands so devised will be chargeable with the pecuniary legacies and annuities, if the personal estate prove insufficient to satisfy the same(q): for, where a testator gives all his real and personal estate to one for life, blending the whole together as one fund; and, after the death of the first object of his bounty, gives certain pecuniary legacies; and then, the rest, residue, and remainder of his real and personal estate to another; the plain intent of the testator must have been, that, the legacies should be paid; and a Court of Equity will support that intent, by making the real estate, if wanted, liable to the payment(r).

It is only against a residuary legatee, that, the real estate must be exonerated from incumbrances, out of the personality.

The equity of parties entitled to real estate, by descent or devise, to have the incumbrance upon it discharged out of the personal estate, subsists only between the heir or devisee and the residuary legatee(s): it cannot interfere with the disposition of specific (t), or even general (u), legacies: much

(o) *Culpepper v. Aston*, 2 Cha. Ca. 117; *Lutkins v. Leigh*, Ca. temp. Talb. 54.

(p) *Bailey v. Ekins*, 7 Ves. 329; *Shiphard v. Lutwidge*, 8 Ves. 30; *Clay v. Willis*, 1 Barn. & Cressw. 372.

(q) *Ambrey v. Middleton*, 2 Eq. Ca. Ab. 407.

(r) *Bench v. Biles*, 4 Mad. 188.

(s) *Hamilton v. Worley*, 2 Ves. Junr. 65.

(t) *Tipping v. Tipping*, 1 P. Wms. 730; *O'Neal v. Meade*, 1 P. Wms. 694.

(u) *Hamilton v. Worley*, *ubi*

much less, as we have seen, with the claims of creditors (*x*). And further, as against real estate *descended*, if specialty creditors of the ancestor exhaust his personal estate, his legatees may stand in their place, and come upon the real estate: and they will have the same equity as against a *residuary* devisee; for, *ex vi termini*, he was only intended to take the rest and residue, after all just claims satisfied. But, in any other case, it must be understood to have been equally the intention of the testator, that, his devisee should have his land, as that his legatee should take his personalty; and although the personal estate should be exhausted by the debts of specialty creditors, the legatee has no remedy over, against the devised estate (*y*): unless the debts were secured by mortgage on the very estate devised (*z*). Subject to these qualifications, however, no principle is better established than, that, the personal estate, without special directions, is, the *primary* fund for payment of debts and legacies; it is not enough to shew that the real estate is charged therewith, but it must be satisfactorily shewn, that, the personal estate is discharged (*a*): still, where such an intention

If specialty creditors exhaust a testator's personalty, his legatees may come upon the real estate, *pro tanto*, as against the heir, or *residuary* devisee.

Personal estate is the primary fund for payment of debts and legacies:

suprà; *Davis v. Gardiner*, 2 P. Wms. 190; *Rider v. Wager*, 2 P. Wms. 335.

(*x*) *Lutkins v. Leigh*, Ca. temp. Talb. 54: *ante*, p. 380.

(*y*) *Hanby v. Roberts*, Ambl. 129; *Long v. Short*, 1 P. Wms. 404; *Haslemood v. Pope*, 3 P. Wms. 323; *Herne v. Meyrick*, 1 P. Wms. 202; *Clifton v.*

Burt, 2 P. Wms. 679.

(*z*) *Forrester v. Lord Leigh*, Ambl. 174; *O'Neal v. Meade*, 1 P. Wms. 694; *Lutkins v. Leigh*, Ca. temp. Talb. 55.

(*a*) *Tower v. Lord Rous*, 18 Ves. 138; *Bootle v. Blundell*, 19 Ves. 548; *Watson v. Brickwood*, 9 Ves. 454.

Estates descended, the secondary fund; and estates devised, subject to a charge, auxiliary only.

tion is plainly made out, it will prevail (*b*). But, though a testator may have expressly directed, that, his personal estate (the primary fund) shall not be applied in payment of his debts; it cannot thence be argued, that, estates which he has left to descend (and which, when particular lands have not been devised for that special object, are the secondary fund (*c*),) shall not be applicable to payment of the debts, before estates devised, subject to a charge only for that purpose (*d*). In such a case, the devised estate will be considered as auxiliary only; unless the descended estate be expressly exonerated (*e*).

Legatees must abate equally in case of a deficiency of assets, unless an intended preference be clearly expressed: which will not be inferred from slight circumstances:

In case of a deficiency of a testator's assets, it is matter of obvious fairness, that, all his legatees should abate equally: unless a preference of any be distinctly expressed in the will, and the legacies to others are made payable only in case there should be a surplus, after full satisfaction of the bequests to the favored legatees (*f*). Such a preference is not to be inferred from a direction, that, certain legacies should be paid "in the first place;" this, or any similar expression, only marks the order in which it occurred to the testator to name the objects of his bounty, or to give directions to his executors. Nor will the fact, that, different

(*b*) *Greene v. Greene*, 4 Mad. 157; *Burton v. Knowlton*, 3 Ves. 108.

(*c*) *Harmood v. Oglander*, 8 Ves. 125; *Manning v. Spooner*, 3 Ves. 117.

(*d*) *Milnes v. Slater*, 8 Ves.

306; *Davies v. Topp*, 1 Br. 526; *Galton v. Hancock*, 2 Atk. 431.

(*e*) *Barnemell v. Lord Cawdor*, 3 Mad. 456.

(*f*) *Marsh v. Evans*, 1 P. Wms. 668.

different periods are appointed for payment, exempt those first payable from abatement, if the assets shall subsequently be found insufficient for satisfaction of the whole. The *prima facie* presumption must always be, that, a testator considered he had property sufficient to answer all the legacies by him given, and, that, he intended all should be paid equally, in their order (*g*). But, where a testator has given a portion, in general terms, and also a legacy, which he has directed to be paid out of a certain fund; the latter gift is such a demonstrative legacy as will be entitled to priority of payment; and, if the funds fall short for satisfying both demands, the deficiency must fall exclusively on the portion (*h*). It is evident, that, when a testator's assets are not ample, it may be most important to ascertain whether a person can claim a lapsed legacy by substitution, or only as residuary legatee; since, in the former case, he would be on the same footing as the other legatees, and entitled to such proportionable dividend as the estate may afford, after payment of preferable charges; whilst, in the latter case, he could have no benefit but in the event of a surplus after full satisfaction of the other legacies (*i*).

but a demonstrative legacy may be entitled to priority over a general legacy.

Distinction; whether a person claims a lapsed legacy by substitution, or as residuary legatee.

Where the owner of an estate has, himself, subjected his real estate to a mortgage debt, and dies; his

The order in which the several funds of a deceased

- (*g*) *Beeston v. Booth*, 4 Mad. 179.
 168; *Clark v. Sewell*, 3 Atk. 99; *Lewin v. Lewin*, 2 Ves. Senr. 417; *Blower v. Morritt*, 2 Ves. Senr. 421.
 (*h*) *Acton v. Acton*, 1 Meriv. ante, p. 326.
 (*i*) *Rose v. Rose*, 17 Ves. 351; *Fonnereau v. Poyntz*, 1 Br. 477; *Humphreys v. Humphreys*, 2 Cox, 186. And see,

ed mortgagor must be applied in discharge of the mortgage debt:

the rule not affected by the mere fact, that, the mortgaged estates were devised, "subject to the incumbrances thereon:"

his personal estate is first applicable to the discharge of his covenant for payment of that debt (*k*); and the case would be the same even although there were no covenant, if the mortgagor received the money (*l*). If the personal estate prove deficient, real estate, devised, subject to the mortgagor's debts, must be applied to the discharge of the mortgage (*m*): and, where a testator, after a general direction that all his debts shall be paid, leaves real estates to descend, these, if required, must be applied in exoneration of the mortgaged estate (*n*). So, if the owner of a mortgaged and also of an unincumbered estate, devise each specifically, after subjecting his real estate generally to payment of his debts; it seems, the devisee of the mortgaged estate may come upon the devisee of the unincumbered estate for contribution, (proportioned to the respective value of the two estates,) towards paying off the mortgage (*o*). The mere fact of devising a mortgaged estate "subject to the incumbrances thereupon," (but without expressly exonerating other funds from liability in respect thereof,) will not affect a question of this kind; these words convey no more than would be implied if they had not been used; the testator could not declare the incumbrances to be no *lien* (*p*).

The

(*k*) *Robinson v. Gee*, 1 Ves. Br. 240.
Senr. 252.

(*l*) *King v. King*, 3 P. Wms. 260, note; *Powis v. Corbet*, 3 Br. 556.
360; *Cope v. Cope*, 2 Salk. 449.

(*m*) *Bartholomew v. May*, 1 P. Wms. 505.
Atk. 487; *Marchioness of Tweedale v. Earl of Coventry*, 1

(*o*) *Carter v. Barnardiston*, 1 P. Wms. 505.
(*p*) *Serle v. St. Eloy*, 2 P.

The rule above laid down, however, has no application where the mortgage debt was not originally contracted by the testator (*q*); for this would be to make the personal estate of one man answerable for the debt of another. But, any one, of course, may make himself personally responsible for a debt contracted by another; and though where a man buys an estate subject to a mortgage, but enters into no contract, or communication, with the mortgagee; and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor; but merely indemnifies the vendor against the mortgage debt, which he must do if he pays a less price in consequence of that incumbrance; he does not, by that act, take the debt upon himself personally (*r*): still, where the purchaser of an equity of redemption directly contracts with the mortgagee, who joins in the conveyance; that transaction will have the effect of constituting a new debt from the purchaser, to which his personal estate will be liable (*s*).

But, where the debt was not contracted by the testator, it will remain a charge upon the mortgaged estate, unless he took it upon himself by contract with the mortgagee:

On the other hand, where an incumbrance is in its nature real, or where it has been dealt with as such, by a person having power to fix the incumbrance

And an incumbrance may be fixed on the realty alone;

Wms. 386; *Bootle v. Blundell*, 19 Ves. 528.

(*q*) *Evelyn v. Evelyn*, 2 P. Wms. 664; *Earl of Tankerville v. Fawcett*, 1 Cox, 239; *Basset v. Percival*, 1 Cox, 270; *Parsons v. Freeman*, Amb. 115: see, also, *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 201.

(*r*) *Tweddell v. Tweddell*, 2 Br. 154; *Waring v. Ward*, 7 Ves. 336; *Butler v. Butler*, 5 Ves. 538.

(*s*) *Earl of Oxford v. Lady Rodney*, 14 Ves. 425; *Waring v. Ward*, 7 Ves. 338, 340; *Billingham v. Walker*, 2 Br. 608.

brance on the realty alone; there, the land may be primarily liable to the debt (*t*): or, an entire end may be put to the personal claim, by the nature of the arrangements between the parties (*u*).

or, the land may be made the primary fund, as far as a surety is concerned.

And even where the land was auxiliary only to the personal estate of the party who originally contracted the debt; yet, with respect to any other party who enters into a personal covenant, as an additional security for the satisfaction of the creditor, that covenant may be so framed as to alter the nature of the debt, as far as the surety is concerned; and, as to him, to constitute the land the primary fund (*x*). Thus, in case of a mortgage, or any other incumbrance upon lands arising out of borrowing and lending, the real estate is considered only as a pledge; and the personal estate of the borrower, which is the natural fund, is liable in

Where money is borrowed upon mortgage of a wife's separate estate, and at the same time a settlement is made on her; though the husband may have given bond for the money, yet, as between themselves, the wife's estate alone is liable to the debt;

the first place; yet, this rule has not been carried so far as to extend it to cases of marriage settlements (*y*), under certain circumstances; for instance, where money has been borrowed upon mortgage of a wife's separate estate, and at the same time a settlement has been made upon the wife, (whether such transaction take place before or after the marriage of the parties,) there is no instance in which the husband has been considered

answerable

(*t*) *Dowager Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 225, 238; and *S. C.* very fully given at the end of Francis's Maxims, appended to 2 Fonbl. Tr. on Eq. see pp. 79, 82, 86, 90; *Clinton v. Hooper*, 1 Ves. Junr. 186; *Lech-*

mere v. Charlton, 15 Ves. 198;

(*u*) *Hamilton v. Worley*, 2 Ves. Junr. 65.

(*x*) *Bagot v. Oughton*, 1 P. Wms. 348.

(*y*) *Lanoy v. Duke of Athol*, 2 Atk. 445.

answerable to the wife's estate for the money borrowed. As between them, and their heirs and representatives, it will make no difference that the husband gave bond for payment of the money and performance of the covenants; and that the creditor might have sued him on such bond: had that been the case, a Court of Equity would have given him relief over, and decreed him to be repaid out of the wife's estate. And, it rather seems, that, it will be of no avail to shew, that, part of the money, so borrowed, was applied to the husband's private use; for, by the settlement, he was a purchaser thereof (z). But, where a settlement forms no part of the same transaction, and it is merely (in whatever shape) a loan from the wife to the husband; there, although the wife may charge her separate estate for her husband's debt; she will be a creditor as against his estate for any sum she may be called upon to pay in respect of that engagement (a).

it would be otherwise if a settlement formed no part of the transaction.

We have seen, that, a devise subject to payments of the testator's debts will not exonerate his personal estate; it shews nothing more than an intention, that, all his debts should be paid, and that, if necessary, his real estate should be applicable to this purpose. But, a direction to apply a particular portion of the real estate, for the payment of one particular debt, affords a very different inference.

Effect of a direction to apply a particular portion of real estate, to the payment of a particular debt.

(z) *Lewis v. Nangle*, Ambl. 150; *S. C.* 2 Cox, 240; *Jackson v. Innes*, 1 Bligh, 122; *Clinton v. Hooper*, 3 Br. 211; *Ruscombe v. Hare*, 6 Dow, 10, 19: see, however, *Earl of Kin-*
noul v. Murray, 3 Swanst. 208, 216, note.
 (a) *Parteriche v. Powlet*, 2 Atk. 384; *Tate v. Austin*, 1 P. Wms. 265.

The person on whom a lapsed legacy devolves, cannot claim an exoneration, intended only in favor of the legatee.

A mere direction that a testator's debts should be paid *by his executors*, will not charge his real estate.

A direction that certain charges shall be paid out of "rents and profits" of real estates, *may* pass the land itself.

ference (*b*). And it is to be observed, as a qualification of some of the positions before laid down, that, although a bequest may have been given exonerated from incumbrances; (to which, without special directions in the will, it would, in the first place, have been liable,) should the bequest lapse, the personal representative will not be entitled to the benefit of that exoneration, which was intended only in favor of the individual legatee (*c*).

When all a testator's real estate is specifically devised, a mere direction in his will, that, all his debts shall be paid *by his executors*, will not have the effect of charging his real estate; with which his executors, as such, have nothing to do: it would be otherwise if the executors were also the devisees, so that they had the means of paying the debts out of the real estate (*d*).

When a testator, after directing certain charges to be paid out of the "rents and profits" of his real estates, has fixed a particular time within which that purpose is to be carried into effect; if the rents and profits, in the ordinary sense of those words, would be insufficient for the end required, Courts of Equity have held, that, these words, in a will, may pass the land itself (*e*), where there is nothing

(*b*) *Hancox v. Abbey*, 11 Ves. 186; *Spurway v. Glyn*, 9 Ves. 485; *Maugham v. Ma-son*, 1 Ves. & Bea. 413.

(*c*) *Hale v. Cox*, 3 Br. 324; *Waring v. Ward*, 5 Ves. 675; *Noel v. Lord Henley*, 7 Price, 259: see, *ante*, p. 282.

(*d*) *Ponell v. Robins*, 7 Ves. 211; *Keeling v. Brown*, 5 Ves. 361; *Bridges v. Landen*, cited, 3 Ves. 550; *Barker v. Duke of Devonshire*, 3 Meriv. 312.

(*e*) *Allan v. Backhouse*, 2 Ves. & Bea. 75; *Baines v. Dixon*, 1 Ves. Senr. 42; *John-*

nothing in the will to exclude that construction. . But, of course, where there are other words explaining or restraining the testator's meaning; as, for instance, where he gives a leasing power, no such construction can be made; for the power to lease would be frivolous, if a sale (which would include every thing) were intended (*f*). The same reasoning would, even more forcibly, apply, if a power of mortgaging were given (*g*). But, a devise of real estate, professedly for the payment of debts, if given in a manner which would not answer that purpose, could only be looked upon as a scheme for taking the case out of the statute against fraudulent devises (*h*). If a portion be secured by a trust term, with a direction that it shall be raised by "rents and profits," and no time is limited for payment; the money cannot be raised by sale or mortgage (*i*): but, if the trust term be created, not merely for the purpose of raising a portion, but, for the payment of debts also; and the testator provides, in the same clause, for the payment of both, together; the natural inference is, that, he intends both shall be paid in the same way; and as, for payment of debts, the term, if necessary, may be sold or mortgaged, the party for whom

In what case a portion, directed to be raised out of the "rents and profits" of a trust term, may be raised by sale or mortgage.

son v. Arnold, 1 Ves. Senr. 171; *Trafford v. Ashton*, 1 P. Wms. 418; *Bootle v. Blum-dell*, 1 Meriv. 233. See, *ante*, p. 293.

(*f*) *Ivy v. Gilbert*, 2 P. Wms. 19; *Mills v. Banks*, 3 P. Wms. 7.

(*g*) *Ridout v. Lord Plymouth*, 2 Atk. 105.

(*h*) *Hughes v. Doulsen*, 2 Ves. 614.

(*i*) *Evelyn v. Evelyn*, 2 P. Wms. 666; *Okeden v. Okeden*, 1 Atk. 550; *Sheldon v. Dormer*, 2 Vern. 310.

whom the portion is intended will participate in the benefit of that equity (*k*).

The intention, not the use of any technical words, is to determine whether a condition be precedent or subsequent.

Rules as to conditions subsequent in restraint of marriage;

and the, seemingly, contrary rule as to conditions precedent, annexed even to personal legacies.

There are no technical words to distinguish conditions precedent and subsequent, in a will; but the same words may, indifferently, constitute either; according to the intention of the person who creates the condition (*l*). Where a legacy is given, to which a condition *subsequent*, in restraint of marriage, is annexed; the condition is void, and merely *in terrorem* (*m*): unless there be also a valid bequest over of the particular legacy; or, at least, (it should seem), unless the will contain an *express* direction, that, such legacy, if the condition annexed thereto be not complied with, should sink into the residue of the testator's property (*n*).

Whether the same rule holds good, with respect to personal legacies, where the condition is *precedent*, is a question on which great diversity of opinion has existed (*o*). The preponderance of authority, however, seems to establish, that, even as to strictly personal legacies, where the condition is confined within reasonable limits as to time (*p*), and does not go in entire restraint of marriage; and, also, where it is framed only to guard

(*k*) *Bootle v. Blundell*, 1 Wils. 136; *Scott v. Tyler*, 2 Meriv. 233. Dick. 720; *S. C.* 2 Br. 462;

(*l*) *Robinson v. Comyns*, Ca. *Stackpoole v. Beaumont*, 3 Ves. temp. Talb. 165. 96; *Hervey v. Aston*, Willes,

(*m*) *Reynish v. Martin*, 3 95; *Clarke v. Parker*, 19 Ves. Atk. 332; *Hicks v. Pendarvis*, 14. 2 Freem. 41.

(*n*) See, *infra*, p. 397.

(*o*) *Lloyd v. Branton*, 3 Mer. 16; *Stackpoole v. Beaumont*, 3 117; *Wheeler v. Bingham*, 1 Ves. 98.

(*p*) *Scott v. Tyler*, 2 Dick.

723; *Graydon v. Hicks*, 2 Atk.

16; *Stackpoole v. Beaumont*, 3

Ves. 98.

guard against a connexion with a particular individual (*q*), or family, which the testator deems objectionable; in all such cases, the condition must be complied with, or the legacy (though not given over) can never vest: or, at least, not be payable (*r*). But, a condition in restraint of marriage, excluding a whole profession or calling, would be void (*s*): and so, it seems, would a condition restraining marriage with any other than a person possessed of an unincumbered real estate of such an amount as would imply a virtual exclusion of most professions (*t*): for this would be an evasion of that policy which was, perhaps wisely, enforced by the civil Law; in part adopted by our Law, and still retained; though it has been shewn (*u*), by cogent arguments and induction of facts, that, such policy is of very doubtful application to the present state of our country.

But conditions which would, virtually, go almost to the entire exclusion of marriage, are void.

Interests arising out of land must, clearly, be governed by the rules of common Law (*x*): therefore, devises of land, charges upon it, powers to be exercised over it, money to be laid out in lands, and all similar gifts savouring of *realty*; if coupled with a condition, must be executed with analogy to the common Law (*y*). Lord Hardwicke declared, that, he held nothing more fixed, since the

All gifts savouring of the realty, if coupled with a condition, must be executed with analogy to the common law; thus, portions charged on lands cannot vest before the time of payment comes; which will not be until the condition is performed:

(*q*) *Jervoise v. Duke*, 1 Vern. 19.

(*r*) *Elton v. Elton*, 1 Ves. Senr. 6; *Knight v. Cameron*, 14 Ves. 392.

(*s*) 1 Equ. Ca. Ab. in margin.

(*t*) *Keily v. Monck*, 3 Ridgw. P. C. 263.

(*u*) See Malthus on Population, *passim*.

(*x*) Co. Litt. 206.

(*y*) *Scott v. Tyler*, 2 Dick. 719.

the case of *Paulet v. Paulet* (x), than that, portions charged on lands will not vest till the *time of payment* comes, and if that time, according to the will, be not until a marriage with consent, his Lordship said, there was no rule, in Law or Equity, which could excuse the want of such consent. In the same judgment, it was also intimated, that, it was unimportant whether there was, or was not, a devise over: for, being portions to arise out of lands, they had nothing testamentary in them, so as to be subject to the jurisdiction of the Ecclesiastical Courts, or the rules of the civil Law. It was added, that, a material difference existed between portions out of lands and personal legacies, in this respect, (amongst others,) namely, that, in the first case, if the party die before they become *payable*, they shall not be raised (a); in the latter, the legacy, if vested, will go to the executor; the ground of this distinction being, that, Courts of Equity, for uniformity of decision *in pari materia*, follow the Ecclesiastical Courts in the one case, and the common Law in the other (b). Lord Rosslyn seemed disposed to deny,—not, indeed, the *fact* of the existing distinction pointed out by Lord Hardwicke, but—that there was any *ground* for a distinction, in the construction of legacies, whether such legacies were given out of personal, or out of real, estate. His Lordship held, that, the construction

ought

So, portions out of lands are not to be raised, if the parties to receive them die before the portions are payable.

The different construction as to legacies given out of personalty, from that which is made with respect to legacies charged upon real estate; as well as the distinction between conditions prece-

(x) 2 Freem. 93.

(a) *Pearce v. Loman*, 3 Ves. 138.

(b) *Harvey v. Aston*, 1 Atk. 378, 379; S. C. Willes, 91;

Reynish v. Martin, 3 Atk. 333;

Pullen v. Ready, 2 Atk. 590;

Sheriff v. Mortlock, W. Kelynge, 24.

ought to be precisely the same, in both cases (c); and professed to see no more real importance in the distinction between conditions precedent and subsequent: but, though he held these distinctions to have arisen only from an attempt to escape the difficulty entailed by a blind superstitious adherence, on the part of the Ecclesiastical Courts, to the text of the civil Law, (adopted without seeing how inapplicable it was to a country, in this instance, under totally different circumstances (d),) his Lordship was not called upon, by the facts of the case then before him, to make a decree repudiating these distinctions, judicially; as the question arose out of a condition *precedent*, and imposing no restraint on marriage after the legatee should attain her age of twenty-one years; before which, by the general Law of this country, marriage cannot be had without consent (e).

Whether the appointment of a residuary legatee amounts to a gift over of a legacy, given on a condition which has not been fulfilled, is a question upon which the determinations have been at variance. Mr. Justice Comyn, and Chief Justice Willes, in *Harvey v. Aston* (f), held, that, a general residuary bequest was a good devise over in such cases. And the same doctrine had, previously, been held in *Amos v. Horner* (g). But,

Quære, whether the appointment of a residuary legatee amounts to a gift over of a legacy given on a condition?

The *dicta* are at variance:

Sir

(c) And see Lord Eldon's opinion in *Clarke v. Parker*, 19 Ves. 14.

(d) *Pearce v. Loman*, 3 Ves. 139.

(e) *Stackpoole v. Beaumont*, 3 Ves. 95, 98.

(f) 1 Atk. 376, 377.

(g) 1 Eq. Ca. Ab. 112. See Willes, 96.

Examination
of the cases on
this subject:

*Bellasis v. Er-
mine* does not ap-
pear, by the re-
cords, ever to
have received a
final determina-
tion:

Sir Joseph Jekyl, M. R. thought differently (*h*): and in *Keily v. Monck* (*i*), it was said, somewhat too broadly, that, determinations to the contrary have been made in every instance in which the question has arisen. One of the three cases cited to support this sweeping assertion—the case of *Garret v. Pritty* (*k*),—it has been since satisfactorily shewn (*l*), could not have proceeded on the ground stated by the reporter. The second precedent cited—that of *Bellasis v. Ermine*—is not, in either of the published notes of that case (*m*), brought down lower than the hearing of a plea: and in neither of the reports is it stated whether there was, or was not, a residuary devise. This important circumstance not being noticed, either way; the mere naked fact, that a plea was overruled, and the defendant ordered to put in an answer, can hardly be deemed an expression, by the Court which made that order, of a conclusive opinion on the main question. The present writer has, therefore, thought it his duty to search the records, and endeavour to ascertain the precise circumstances of the case: his search, however, has not been attended with complete success. The examination has, indeed, enabled him to bear testimony to the accuracy of both the printed reports (*n*); and to vindicate them from the charge of

(*h*) *Hervey v. Aston*, Ca. note thereto.
temp. Talb. 214.

(*i*) 3 *Ridgw. P. C.* 252.

(*k*) 2 *Vern.* 293.

(*l*) See *Lloyd v. Branton*, 3
Mer. 119; and Mr. Merivale's

(*m*) 2 *Freem.* 171; 1 *Cha. Ca.*

22.

(*n*) See *Reg. Lib.* 1662, A.
fol. 729.

of omission, in not stating any final decision of the case; for none such is entered:—or, at least, whoever discovers the entry must be more industrious, or more fortunate, than the present writer; who bestowed some pains on the search. The latest notice he could trace was, an order for an attachment, to compel the defendant to put in a better answer (*o*). But, by a previous entry of an interlocutory order, (not material, for this purpose, in any other respect,) it may be collected, that, the portion in question was charged on *lands*, given to trustees for the purpose of raising such portion by a sale (*p*). This circumstance should seem to bring the case within the reasoning (already stated,) of Lord Hardwicke in *Hervey v. Aston*, and in *Reynish v. Martin*; as well as of Lord Thurlow, in *Scott v. Tyler*; and suggests, that, the question must have been finally decided (if it was not compromised between the parties) by the rules of common Law. The authority of the third case, cited in support of the doctrine maintained in *Keily v. Monck*, depends, for this purpose, upon a negative inference, drawn from the omission by one of the reporters of that case, of a passage distinctly stated by the other. One report (*q*) of *Wheeler v. Bingham* is silent as to an observation, which, according to another report (*r*), fell from Lord Hardwicke; in which his Lordship made a clear distinction between a mere general residuary bequest, and an express direction, that, if the le-

but, as the question in that case was as to a portion charged on lands, the decision (if any were made) must have been governed by the rules of common Law.

In *Wheeler v. Bingham*, this distinction was laid down;—that, a mere residuary bequest would not amount to a devise over; but, an express direction, that, on non-

gatee

(*o*) Reg. Lib. 1663, A. fol. 472.

258.

(*q*) 1 Wils. 135.

(*p*) Reg. Lib. 1662, A. fol.

(*r*) 3 Atk. 368.

performance of the condition, the legacy should fall into the *residuum*, would have that effect.

legatee should not perform the condition, the legacy should fall into the *residuum*; such a direction, his Lordship held, would amount to a devise over. This distinction was rejected in *Keily v. Monck*, but recognized in more than one later case (*s*): and seems substantial. For, although it should be admitted, that, a direction for a legacy to go to the testator's executors, in case of the non-performance of a condition, is no more than the Law would imply (*t*); and therefore is not tantamount to a bequest over: still, the very decisions which have declared, that, a mere residuary clause was not a gift over, by consequence, decided, that, the legacy did not, by operation of Law, fall into the residue;—for if it did, the residuary legatee would, in each case, have been entitled to it (*u*). Unless, therefore, it be denied, that, a testator has it in his power, by any form of words, to give an interest to his residuary legatee, in such conditional legacies as may be forfeited; Lord Hardwicke's distinction can, with consistency, be held unimportant, only by those who think a mere general residuary bequest sufficient to carry such forfeited legacies; and not by those who maintain a contrary doctrine.

It is not to be denied, that, upon this subject, there has been a contrariety of judicial opinion actually expressed; at the same time, it may be safely alleged, that, a great part of the obscurity as to the

(*s*) *Lloyd v. Branton*, 3 Mer. 352.

118; *Malcolm v. O'Callaghan*, 2 Mad. 350.

(*u*) *Lloyd v. Branton*, *ubi supra*.

(*t*) *Cage v. Russel*, 2 Ventr.

the doctrine which really preponderates, is referrible to the discrepancies between the several printed reports of the same judgments. Of this we have already seen one instance; another is easily produced. From the report of *Scott v. Tyler*, as given by Mr. Brown (x), several commentators, (to whose industrious researches the legal profession is much indebted,) have been led, in succession, to a conclusion, that, Lord Thurlow had pronounced a distinct opinion, holding a mere general residuary devise to be tantamount to a devise over (y): from the note of the judgment in that case, however, as published from the manuscript of Mr. Dickens (z), it appears, Lord Thurlow considered it to have been, repeatedly and well, determined, that, a mere residuary bequest leaves a conditional legacy *in statu quo*; and has no other effect than that of preventing what proves not to be otherwise well disposed of from falling, by order of Law, to the executor or next of kin. This doctrine, coupled with that laid down by Lord Hardwicke in *Wheeler v. Bingham* (a), seems to afford the rule most to be relied upon; and which has, accordingly, been followed in the most modern cases (b).

In *Scott v. Tyler*, it was held, that, a mere general residuary bequest leaves a conditional legacy *in statu quo*.

This doctrine, coupled with that laid down in *Wheeler v. Bingham*, seems to afford the rule most to be relied on.

It is clear, that, a bill for a legacy, given on marriage, cannot be brought before any marriage

Marriage must always be considered a condi-

(x) 2 Br. 431.

Vern. 20.

(y) See the conclusion of the last note to *Hervey v. Aston*, in Ca. temp. Talb. 217; the last note (also *ad finem*) to the same case in 1 Atk. 381; and the note to *Jervoise v. Duke*, 1

(z) 2 Dick. 723.

(a) 3 Atk. 368.

(b) *Lloyd v. Branton*, 3 Mer. 118; *Malcolm v. O'Callaghan*, 2 Mad. 350.

tion precedent to the vesting of a legacy given *causâ matrimonii*.

riage had. Therefore, although a proviso requiring consent to marriage may be treated as if inserted only *in terrorem*, (where there is no devise over,) so far as to save the legatee from forfeiture, although he, or she, should marry without consent; still, the condition must at least be looked upon as appointing the time when the legacy shall become due; and marriage is a condition precedent to the vesting (c).

Even in the case of a strictly personal legacy, given alternatively, Equity will not relieve, if the precedent condition be not complied with.

It seems, that, where a parent, or any one *in loco parentis*, makes a provision for a child in the alternative; namely, that, in case a condition precedent be complied with, the child shall have a larger portion; but, if the condition be not performed, a smaller; Equity will not relieve against the consequences of non-performance, even in the case of a strictly personal legacy, not charged on land, and where there is no devise over (d). Of course, the case would be stronger if there was no relationship between the parties.

In what case a legacy is discharged from a condition.

When a condition subsequent becomes impossible by the act of God, the interest of a legatee, or devisee, is discharged from the condition, and re-

No one can take advantage of a bequest over, who has himself caused a breach of the condition.

mains absolute (e). And, if the compliance with the condition be, in any way, prevented by the fraud of the party interested in the bequest over, such party will not be allowed to take advantage of

(c) *Garbut v. Hilton*, 1 Atk. 381; *Atkins v. Hitchcocks*, 1 Wms. 284; *Creagh v. Wilson*, 2 Vern. 572.

(e) *Peyton v. Bury*, 2 P. Atk. 502; *Elton v. Elton*, 3 Wms. 626; *Aislabie v. Rice*, 8 Atk. 507; *Parker v. Parker*, 2 Freem. 58. Taunt. 467.

(d) *Gillet v. Wray*, 1 P.

of his own wrong (*f*). The case would be the same, it seems, where a person having a prospect of benefit from the forfeiture, has encouraged a breach of the condition; although no fraud be imputed (*g*). On the other hand, if the consent of any individual to the marriage of a legatee has been made, by the testator, a condition precedent, necessary to vest the legacy; there, if such consent has been obtained through any deceit or fraud, it may, at any time before the marriage, be retracted (*h*).

Consent to marriage, if obtained by deceit, may be retracted.

Where a marriage portion to a woman has been bequeathed in trust, on condition that a settlement shall be made upon her, previous to marriage; if a settlement precisely in the terms of the will be defeated by the neglect and mistake of the trustee, he will be compelled to pay the portion, upon an execution of the settlement after the marriage (*i*). It has even been determined, that, where one of several trustees has withheld his consent, for a vicious or unreasonable cause, that should not affect the consent given by the majority, where it was reasonable they should consent (*k*). But this jurisdiction, which Courts of Equity have assumed, of determining whether consent can be implied

Rules with respect to trustees impeding the strict performance of a condition;

or unreasonably withholding their consent to a marriage:

(*f*) *Dashmood v. Lord Bulkeley*, 10 Ves. 243; *Garrett v. Pretty*, as stated from *Reg. Lib.* 3 Meriv. 120; *Clarke v. Parker*, 19 Ves. 12.

6; *Smith v. Huson*, 1 Phillim. 300; *Clarke v. Parker*, 19 Ves. 13.

(*i*) *O'Callaghan v. Cooper*, 5 Ves. 122: see, also, *Dashmood v. Lord Bulkeley*, 10 Ves. 244.

(*g*) *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 225: see the head of "Matters of Trust."

(*k*) *Clarke v. Parker*, 19 Ves. 15.

(*h*) *Merry v. Ryves*, 1 Eden,

if the *acting* trustees consent, that is sufficient.

In what cases a condition requiring the consent of a testator's executors to a marriage, is discharged.

ed (*l*), or whether it has, or has not, been *reasonably* withheld (*m*), has been pronounced to be very dangerous; since, if it is to be understood, that, a Court of Equity will inquire, whether the person to whom a discretion is given by the testator, and who meant to act honestly, has come to precisely the same determination which the Court would have made; this amounts to reading the will as requiring the consent of the Court (*n*). The authority to consent, in such cases, is annexed to the office of trustee; and, like other authorities annexed to that office, vests only in such trustees as act: if the acting trustees, therefore, give their consent to the marriage, that may be sufficient (*o*): or a reference may be obtained to a Master to inquire whether the match is a suitable one (*p*). A condition requiring the consent of executors to marriage, will not be held applicable to the case of a daughter of the testator's who married in his lifetime, with his consent, or subsequent approbation: the testator could only have meant to impose the condition with reference to a marriage after his death; that being the only marriage the propriety of which could be ascertained by the consent of executors (*q*). Nor will such a condition apply to a second

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| (<i>l</i>) <i>Worthington v. Evans</i> , 1 Sim. & Stu. 172; <i>Mesgrett v. Mesgrett</i> , 2 Vern. 581. | (<i>o</i>) <i>Worthington v. Evans</i> , 1 Sim. & Stu. 172. |
| (<i>m</i>) <i>Peyton v. Bury</i> , 2 P. Wms. 628; <i>Daley v. Desbouverie</i> , 2 Atk. 264. | (<i>p</i>) <i>Goldsmid v. Goldsmid</i> , 19 Ves. 372. |
| (<i>n</i>) <i>Clarke v. Parker</i> , 19 Ves. 11. | (<i>q</i>) <i>Parnell v. Lyon</i> , 1 Ves. & Bea. 483; <i>Clarke v. Berkeley</i> , 2 Vern. 721. |

a second marriage, if a daughter, once married with the testator's consent, become a widow (*r*).

It is a general rule, that, where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, or no person bound to give notice; the parties must themselves take notice, and perform the condition; if they do not, and there be a devise over, a forfeiture will be incurred (*s*). Infancy will not excuse the non-performance (*t*). But, the application of this general rule is subject to one restriction, where the party, upon whom the condition is imposed as to a devise of real estate, is the testator's heir at law; there, notice of the condition is necessary to work a forfeiture: for, the heir at law is supposed to enter and claim by descent, and not under the will (*u*).

As a general rule, where no one is bound to give notice of a condition, the parties to perform it must themselves take notice:

but, where a condition as to real estate is imposed on the testator's heir at law, notice must be given.

If lands be devised to a stranger, on condition to pay another stranger a sum of money, but the will contains no clause of entry; this is not such a charge on the estate as will give the legatee of the money a *lien* on the lands; but the heir at law will be bound to enter and take advantage of the breach of the condition, though he will, in Equity, be considered only a trustee for the legatee (*x*). And if the lands subject to such a condition

In what case the heir at law may be bound to enter for breach of condition, as trustee for a legatee:

And where, if the lands subject

(*r*) *Hutcheson v. Hammond*, 3 Br. 145; *Crommelin v. Crommelin*, 3 Ves. 230.

(*s*) *Chauncy v. Graydon*, 2 Atk. 619; *Fry v. Porter*, 1 Mod. 314; *Burgess v. Robinson*, 3 Meriv. 9; *Phillips v. Bury*, Show. P. C. 50.

(*t*) *Bertie v. Lord Falkland*, 2 Freem. 221; *Lady Ann Fry's case*, 1 Ventr. 200.

(*u*) *Burleton v. Humfrey*, Ambl. 259.

(*x*) *Wigg v. Wigg*, 3 Atk. 383.

to a condition, fixing a pecuniary charge thereon, have devolved upon the heir at law, they will be fixed with a trust for payment of the money.

tion descended, or were devised, to the heir at law; though he could not *enter* for the condition broken, (being actually in possession,) yet the lands will, in his hands, be fixed with a trust for payment of the legacy; as they would in the hands of any purchaser from him, who had notice of the will; though the money might be lost, if he made a title, solely as heir at law, to a *bonâ fide* purchaser without notice: and, therefore, if, in such case, the legacy be not payable till a future period, the heir may be decreed to give security (*y*).

Distinction between conditions, and conditional limitations.

A clear distinction must always be borne in mind, between conditions and conditional limitations. A conditional limitation, though void by the common Law as to divesting an estate once vested, is permitted under the doctrine of uses, and of executory devises: it takes effect, not by enforcing a penalty, but, by the absolute determination of the previous limitation, without entry or claim by the devisee over (*z*). It must be further recollected, that, all Courts are disposed, as far as the rules of Law admit, to aid, by construction, the intention of a testator; if, therefore, in a will, there be no express limitation over, to take effect upon the breach of a proviso annexed to the preceding estate; although such proviso is so framed as to admit its being construed as a limitation, it *may* be considered as a condition, if that construction

A proviso so framed as to admit its being considered a limitation, may be construed as a condition:

(*y*) *S. C. Anonym.* 2 Freem. 278; *Smith v. Alterley*, 2 Freem. 136.

(*z*) *Newis v. Lark*, (or *Scolastica's case*), Plowd. 412; *Bo-*

raston's case, 3 Rep. 21, a; *Rundale v. Eeley*, Carter's Rep. temp. Bridgman, 171; *Simpson v. Vickers*, 14 Ves. 346.

tion will best answer the apparent intent of the testator (*a*): as, on the other hand, words of apparent condition may be controlled by the context; and either be understood as words of limitation (*b*); or, under peculiar circumstances, as raising a trust only (*c*): and a condition inconsistent with, and repugnant to, a previous gift, is void (*d*).

A repugnant condition is void.

The distinction is important, between a condition collateral to the land, and a condition for payment of money by the devisee, to another object of the testator's bounty. Where the condition is collateral, there non-compliance with such condition will induce an absolute forfeiture, if there be a limitation over; because there can be no recompence given for that: but, where the condition is only for payment of money, though the money be not paid at the day, yet, payment afterwards, with interest, is a satisfaction (*e*).

A condition collateral to land must be strictly performed;

a condition for payment of money, may admit recompence for non-performance.

Where interests are so given by will as to vest immediately in the children of a family, though liable to be divested by their *all* dying, without is-

In what cases a vested legacy, given subject to being divested, will pass to representatives:

sue,

(*a*) *Gulliver v. Ashby*, 4 Burr. 1943: and see *Miles v. Leigh*, 1 Atk. 574.

(*b*) *Murray v. Jones*, 2 Ves. & Bea. 320, 322; *Meadows v. Parry*, 1 Ves. & Bea. 124; *Pearsall v. Simpson*, 15 Ves. 33; *Lane v. Goudge*, 9 Ves. 230.

(*c*) *Taylor v. George*, 2 Ves. & Bea. 381; *Oke v. Heath*, 1 Ves. Senr. 135: See the extract from *Reg. Lib.* in Mr.

Belt's Supplement: which makes the case appear still stronger, as it seems the testator used words of express condition.

(*d*) *Bradley v. Peixoto*, 3 Ves. 325; *Britton v. Twining*, 3 Meriv. 184.

(*e*) *Wheeler v. Whittall*, 2 Freem. 10; *Popham v. Bampfield*, 1 Vern. 83; *Barnardiston v. Fane*, 2 Vern. 366; *Bertie v. Lord Falkland*, 2 Freem. 221.

a vested devise, subject to defeasance, entitles the devisee to the profits, until the estate is actually divested.

The mere circumstance, that, the whole of a bequest is given over, will not, of itself, prevent any shares thereof from vesting:

but, there may be no gift except in the direction for payment;

or the time of division may be annexed to the very substance of the gift.

sue, under twenty-one years of age, or any similar contingency; if the specified contingency, upon which the interests given were to be divested, do not happen, those interests must continue vested; and the share of a child dying under twenty-one passes to its representative (*f*). And, where a devise is absolute, and vested, though with a clause of defeasance; even if the contingency upon which the estate is to be divested should happen, the devisee will be entitled to the rents and profits, up to that period, and such interest will be transmissible (*g*). A devise over of the entirety may, indeed, be called in aid of other circumstances to shew, that, no present interest was intended to pass (*h*): but it would be an untenable proposition to contend, that, the mere circumstance of the whole estate being given over, (whether such estate be real or personal,) does, of itself, and without more, prevent any of the shares from vesting in the mean time (*i*). Undoubtedly, where there is no gift except in the direction for payment, and that direction for payment applies only to persons of a given age; no one who does not bring himself within that part of the description can claim a vested, or transmissible, interest (*k*). The principle is the same, whenever the time of division is annexed

(*f*) *Skey v. Barnes*, 3 Mer. 340; *Harrison v. Foreman*, 5 Ves. 210; *Sturgess v. Pearson*, 4 Mad. 411; *Smither v. Willock*, 9 Ves. 234.

(*i*) *Skey v. Barnes*, *ubi supra*; *Stanley v. Stanley*, 16 Ves. 506.

(*g*) *Shephard v. Ingram*, Amb. 450.

(*h*) *Errington v. Chapman*, 12 Ves. 24; *Bromhead v. Hunt*, 2 Jac. & Walk. 462.

(*k*) *Sansbury v. Read*, 12 Ves. 78; *Errington v. Chapman*, *ubi supra*; *Leake v. Robinson*, 3 Meriv. 386.

annexed to the very substance of the gift; and it is not an independent gift, of which a subsequent time of payment is appointed merely for convenience (*l*). But, generally, a bequest "after the death" of a particular person, is held to denote, not a condition, that, the legatee shall survive such person, but, only to mark the time at which the legacy shall take effect in possession; that possession being only deferred on account of the life interest given to the person on whose death the gift is to take full effect (*m*).

A bequest to one "after the death" of another, generally denotes, not a condition, but only the time when the legacy is to take effect in possession.

Where a testator has devised his estates to his wife for life; and, after her death, to trustees to sell, and to employ £500 of the money arising from such sale in the purchase of an annuity for the life of his son; this is a vested interest in the son immediately on the testator's death: if he survive his mother, he may elect to take £500, without having it laid out in an annuity; and, should he die before the tenant for life (but having survived the testator) his personal representatives will be entitled to the money, as a vested pecuniary legacy (*n*). It must be observed, however, that, a bequest of an annuity to a woman and her children, to be paid out of the testator's general effects, until it should be convenient to the testator's executors to invest a competent sum in the funds in lieu

If a man bequeath a sum of money to purchase an annuity for his son, the son may elect to take the money, without having an annuity purchased.

Nice distinctions made in such cases.

(*l*) *Batsford v. Kebbel*, 3 9; *Yates v. Compton*, 2 P. Ves. 364; *Scott v. Bargeman*, Wms. 309; *Dawson v. Killet*, 2 P. Wms. 68. 1 Br. 123; *Palmer v. Craufurd*, 2 Wils. Ch. Rep. 84;

(*m*) *Blamire v. Geldart*, 16 Ves. 316. *Balmain v. Shore*, 9 Ves. 507;

(*n*) *Bayley v. Bishop*, 9 Ves. *Barnes v. Rowley*, 3 Ves. 305.

lieu thereof, for the use of the legatees and the longest liver of them; has been determined (though not without doubt,) to be annuity only, not an absolute legacy of a specific sum, which the legatees might elect to take, as such (*o*). But, a gift of the dividends to arise from stock in the public funds is, in effect, a gift of the *corpus*, where there is no bequest over of the principal (*p*).

Limits within which a testator may control the devolution of his property.

The Law, as we have seen, from an indulgence to the natural wishes of men to perpetuate their property in their own families, has given them a power of controlling its devolution, for one or more lives in being at the same time, and twenty-one years afterwards. But public convenience, sound constitutional policy, and the spirit of liberty which breathes through every principle of our Law, will not endure any species of property to be chained down longer. A bequest over, therefore, to take place after an indefinite failure of the first taker's issue; is an attempt to practise a fraud upon the Law; and, as such, void (*q*). But, whenever it appears, that, the legatee over was to take *personally*, and not otherwise, this affords a strong presumption, that, an indefinite failure of issue could not be in the testator's contemplation (*r*). So, if the gift over be only in default of issue of the first taker, "living at his death," the limitation over would

In what cases indefinite failure of issue could not be contemplated:

(*o*) *Innes v. Mitchell*, 6 Ves. 307; *Beauclerc v. Dormer*, 2 466; *S. C.* on appeal, 9 Ves. Atk. 312.

(*p*) *Richards v. Richards*, 9 Meriv. 133; *Barlow v. Salter*, Price, 222, 227. 17 Ves. 483.

(*q*) *Keiley v. Power*, Wilm.

would be good (*s*). And, a bequest over, in case the first legatee die without "leaving" issue; is construed to mean, leaving issue *at his death* (*t*). It seems, also, that, when the executors, *nominatim*, are to carry into effect the bequest over, this personal trust will exclude the idea that the testator used the words "without issue" in their technical sense (*u*). But, it is well settled, that, unless there are expressions in the will, or circumstances, from which it can be collected, that, these words were used by the testator in a more confined sense; they must have their legal signification; namely, death without issue generally (*w*). And, in such cases, the question is, whether the limitation was good in its creation; whether it must, necessarily, take place, (if it take place at all,) within the limits prescribed by Law: it will be of no avail to urge, that, in the events which have happened, the limitation does not exceed those bounds (*x*).

But, where there are no circumstances to limit the technical sense of the words "without issue," they must be understood to mean, death without issue generally.

And a limitation not good in its creation, cannot be made good by subsequent events.

If a bequest be made, not to individuals, but, to classes of persons; should there be any individuals of one intended class who cannot legally take, the gift to that whole class must fail. For, it would be making a new will for the testator, if a Court

If a bequest be made in favor of a class of persons collectively, some of the individuals of which class cannot legally take; the whole gift must fail.

- (*s*) *Donn v. Penny*, 19 Ves. 547. (*l*) *Barlow v. Salter*, 17 Ves. 482; *Donn v. Penny*, 19 Ves. 548; *Beauclerc v. Dormer*, 2 Atk. 314.
- (*t*) *Crooke v. De Vandes*, 9 Ves. 204; *Atkinson v. Hutchinson*, 3 P. Wms. 262; *Forth v. Chapman*, 1 P. Wms. 666.
- (*u*) *Keiley v. Power*, Wilm. 163. See *Fearne on Rem.* 483, (6th edit.); *Bigge v. Bens-*
- (*x*) *Jee v. Audley*, 1 Cox, 326; *Routledge v. Dorrell*, 2 Ves. Junr. 363; *Griffiths v. Vere*, 9 Ves. 134.

a Court were to split into portions his general bequest to the class; and to say, that, because the rule of Law forbids his intention from operating in favor of the whole class, his bequests shall be converted into (what the testator never intended them to be, namely,) a series of particular legacies to particular individuals: or, by subdividing the class itself, when no such distinction was in the contemplation of the testator (y). But, where a testator has designated no particular individuals as the objects of his bounty, making his bequest to a class generally; the mere fact that he has mistaken the number of that class will not vitiate the gift; such numerical specification may be rejected, as repugnant. If the legacy be of a certain sum to be divided amongst the class, *ut res magis valeat*, all answering that description will share equally; otherwise, the gift would be void for uncertainty (z). If the bequest be of a fixed sum to each; though the number of legatees may have been incorrectly stated, every individual of the class will be entitled to that sum (a). If, however, a testator, after a bequest to trustees in favor of "all and every one" of a particular class, should proceed to enumerate and name the individuals composing that class; although such enumeration should be defective, it will be considered as sufficiently ascertaining

But a mere mistake as to the number of a class, will not vitiate a bequest to the class generally.

Should a testator, however, after a bequest in trust for "all and every one" of a particular class, name the individuals, no one unnamed will be entitled to share.

(y) *Leake v. Robinson*, 2 Ves. 126; *Tomkins v. Tomkins*, Meriv. 390. cited from *Reg. Lib. ibid.*

(z) *Sleech v. Thorington*, 2 Ves. Senr. 564; *Stebbing v. Walkey*, 2 Br. 86. *Stebbing v. Walkey*, 1 Cox, 251; *Scott v. Fenhoulett*, 1 Cox, 79. See, ante, p. 346.

(a) *Garvey v. Hibbert*, 19

certaining whom the testator meant to include, when he spoke of "all"; and no unnamed individual of the class will be entitled to a share (*b*).

It is now settled, that, a bequest over, in case of the death of a legatee before a certain period, may take effect, if he should die before the time specified, although during the testator's life. Had the first legatee survived the period appointed, and then died before the testator, if that event was not provided for by the will, the legacy must have lapsed (*c*). But when, in such case, the testator has used words sufficiently comprehensive to carry such legacy over, there is nothing, certainly, in point of Law to prevent that intention from taking effect (*d*).

When a bequest over will take effect, and when it will lapse, if the first legatee die before the testator.

If a testator, by his will, says "he returns to *A.* his bond (*e*):" or, that, "he forgives and remits to *A.* the sum he stands indebted on bond (*f*):" or, that, "he gives to *A.* the sum he owes on mortgage," adding a direction, that, his executor should "give *him* up all bonds" owing to the testator (*g*): or, that, after certain deductions, he "gives to *A.* the residue of a recognizance, due from him" directing the executors "freely to deliver the security into the hands of the said *A.*, *his executors, administrators*

If a testator by his will direct a bond to be returned to the obligor; this bounty is legatory only;

(*b*) *Eccard v. Brooke*, 2 & Walk. 7. Cox, 217.

(*e*) *Maitland v. Adair*, 3

(*c*) *Humberstone v. Stanton*, Ves. 281.

1 Ves. & Bea. 388; *Doe v. Brabant*, 3 Br. 398; *S. C.* 4

(*f*) *Ison v. Butler*, 2 Price,

40. T. R. 709; *Calthorpe v. Gough*, 4 T. R. 707, note.

(*g*) *Toplis v. Baker*, 2 Cox, 118.

(*d*) *Walker v. Main*, 1 Jac.

and if the debtor die before the testator, the legacy becomes lapsed.

trators and assigns (h): in none of these cases, will the words of the testator amount to a release of the debt; they are legatory only, and if *A.* should die in the lifetime of the testator, the legacy would lapse, and the securities remain in force. In one case, however, where the words of the will were, "I forgive my son in law the debt he owes me on bond, and desire my executor to deliver the same to be cancelled;" though the legatee died before the testator, Lord Hardwicke gave his representative the benefit of the discharge of the debt: his Lordship thought, the intention was, that *in all events* the bond should be cancelled, as there was nothing *personal* in the direction that it should be delivered up (*i*).

A legacy may be so framed as to release a debt, but the intent must be clear.

A gift of a legacy may, certainly, be so framed as to be a release of a demand; but the intent must be quite clear (*k*).

Where illegitimate children have acquired a name and character by reputation, they may take under that description.

There is no rule of policy against devising to the illegitimate children of a woman, as that creates no uncertainty. The difficulty arises upon a devise to the children of a particular man, by a woman to whom he is not married. But, where illegitimate children have acquired a name and character by reputation, they may take under that description: for it is not the fact of parentage, but the reputation of it, which is to be inquired into. No doubt, "Child, Son, Issue," and every word of that description, must be taken *primâ facie*, to mean legitimate child, son, or issue; but a question may arise, whether it does not necessarily appear,

(*h*) *Elliot v. Davenport*, 1 Atk. 580.
P. Wms. 84.

(*k*) *Wilmot v. Woodhouse*, 4

(*i*) *Sibthorp v. Mozom*, 3 Br. 230.

pear, on the face of the will, that, a testator meant illegitimate children. If it do so appear, and if it be made out, by evidence, who are the individuals who have, by reputation, acquired the name and character of children, they will take under the will.

When it appears, on the face of the will, that the testator meant illegitimate children:

And it is not necessary that the will should contain a description amounting to *designatio personarum*; a testator may give to natural children, as a class (*l*). A prospective bequest, by a testator, to *his* unborn natural children, would not be valid (*m*): But it would be practicable to give, effectually, a legacy to a child with which an unmarried woman was pregnant, without reference to the father; for, where the gift is only to the child of the woman, there can be no uncertainty, no fact to be tried: and, even although the testator should assign, as the motive for his bequest, a belief that he was the father of the illegitimate child *en ventre sa mere*; still, if it were not made a condition precedent to the gift, that the child should actually be the child of a particular individual as the father; and if the child were so described as to ascertain the object intended to be pointed out, it might take under that description (*n*). Upon a devise to children generally, it would be impossible to hold, that, an illegitimate child could share with lawful children;

a gift to them as a class is good.

A prospective bequest by a man to his unborn natural children is not valid; but a legacy may be given to a child with which an unmarried woman is pregnant.

Under a devise to "children," without further designation, an illegitimate child can never take.

- (*l*) *Wilkinson v. Adam*, 1 Ves. & Bea. 446, 447, 450, 452, 453, 462, 465, 466, 468; *Smaine v. Kennerley*, 1 Ves. & Bea. 470; *Lord Woodhouselee v. Dalrymple*, 2 Meriv. 422; *Beachcroft v. Beachcroft*, 1 Mad. 440; *Bayley v. Snelham*, 1 Sim. & Stu. 81. (m) *Arnold v. Preston*, 18 Ves. 288; *Blodwell v. Edwards*, Cro. Eliz. 510; *Earle v. Wilson*, 17 Ves. 532. (n) *Gordon v. Gordon*, 1 Meriv. 153; *Evans v. Massey*, 8 Pr. 35.

children (o); or even, that, it could take, under that designation, without more, although there may be no legitimate children answering the description (p).

An executor, to whom a power of selection amongst the testator's relations is given, is not confined to the rule of the statute of distributions; but a Court never goes beyond that rule.

The statute affords no rule for distribution of estates of *femes covertes*:

Whenever the execution of a will giving bequests to the testator's "relations" devolves upon the Court, the statute of distributions is the rule generally adhered to, for deciding who are entitled to the benefit of the bequest (q): though, an executor to whom a power of selection is distinctly given may go beyond that rule (r): so, a legacy to the testator's relations "by blood or marriage," will be confined to such as come within the statute, and those who have married persons entitled under it (s). The same rule applies, generally speaking, to bequests of personalty to the testator's "family" (t); but, the word "family" in a devise or limitation of real estate, has been frequently held to be a devise, or limitation, to the heir at law (u). But, with respect to the estates of *femes covertes*, the statute affords no certain rule for distribution,

(o) *Cartwright v. Vandry*, Ves. 529.
5 Ves. 534.

(p) *Godfrey v. Davis*, 6 Ves. 48.

(q) *Cruwys v. Coleman*, 9 Ves. 324; but see *Brandon v. Brandon*, 1 Turn. & Russ. 319.

(r) *Walter v. Maunde*, 19 Ves. 426; *Harding v. Glyn*, 1 Atk. 470; *Brown v. Higgs*, 4 Ves. 719, 5 Ves. 503, and 8 Ves. 571; *Supple v. Lowson*, Amb. 730.

(s) *Devisme v. Mellish*, 5

Ves. 529.

(t) *Cruwys v. Coleman*, 9 Ves. 324; *Brandon v. Brandon*, 2 Wils. Ch. Ca. 24; but see *M'Leroth v. Bacon*, 5 Ves. 167; and *Crosley v. Clare*, 3 Swanst. 323, note.

(u) *Wright v. Atkins*, 17 Ves. 261, citing *Chapman's case*, Dyer, 333, b; *Counden v. Clerke*, Hob. 33; and see *Doc v. Smith*, 5 Mau. & Selw. 129; *Pyot v. Pyot*, 1 Ves. Senr. 338.

distribution, even in cases of intestacy; or rather, it contains, in favor of the husband, an express exception from the general rule (*w*): and where a bequest is made, not in favor of "relations," *indeterminately*, but the word relations is qualified by restraining it to particular objects, as, for instance, to *poor* relations, there the gift has been extended to all that were poor, though they stood in different degrees of relationship (*x*): for such a bequest is in the nature of a charity (*y*). It has also been held, that, as there is no uncertainty in a bequest to "*nearest* relations," it is unnecessary to resort to the statute of distributions for a rule of construction; but that those who strictly answer the testator's description should take, to the exclusion of others more remote in point of consanguinity, though within the degrees pointed out by the statute (*z*). Under a limitation, however, to "the first and nearest" of a testator's "kindred, being male and of his name and blood," no one can successfully claim who is not, by birth, of the same name, as well as of the same blood, as the testator. The requisite qualification as to the name is not satisfied by an assumption of the name, with the King's licence: no one who is not entitled to the name by descent can answer the description required by the testator (*a*).

nor is a reference to the statute necessary, when the testator has himself defined what description of relations he meant.

To make title under a devise to the testator's "kindred of his name and blood," the claimant must be of the same name by descent:

So,

(*w*) See the last section of stat. of 29 Car. 2, c. 8; and *Brandon v. Brandon*, 3 Swanst. 325. from *Reg. Lib.* in note to 17 Ves. 373; *White v. White*, 7 Ves. 423.

(*x*) *Crosley v. Clare*, 3 Swanst. 323, note; *Brunsdon v. Woolridge*, Ambl. 507. (*z*) *Smith v. Campbell*, 19 Ves. 400; *Brandon v. Brandon*, 8 Swanst. 319. (*a*) *Leigh v. Leigh*, 15 Ves.

(*y*) *Isaac v. De Friez*, stated 100, 109.

unless the testator only meant to point out a particular stock.

Observation as to the case of *Pyot v. Pyot*.

When, under a devise in trust, the descent has been broken, though two sisters who prove to be the *cestuis que trust* should also be the testator's co-heiresses, they will take by purchase.

So, where a devise was made to a female on condition of her marrying a person of the testator's name; she married a person who changed his name to that prescribed by the will; but, it was determined, that, this voluntary change was not a performance of the condition, and did not entitle the party to the benefit of the devise (*b*). If it appear, however, that, the testator only meant to point out a particular *stock*, the construction may be different: thus, a testator by a bequest to his daughter, and, in case of her death, then over to "her nearest relation of the name of the *Pyots*," was held only to point out the *stock*, in favor of which he directed a devolution of his property; and, that, it was not necessary the individual who answered his description, in this principal respect, should also, at the time of the testator's decease, bear the name of *Pyot* (*c*). It is to be observed, that, in this case, the patronymic name of the parties to whom the bequest was adjudged was "*Pyot*," though, being females, they had changed it by marriage, subsequently to the making of the will.

A devise to trustees, their heirs and executors, does not the less break the descent of the devised estate, because the trustees are directed, after certain charges are satisfied, to convey and assign the estate, to persons described as purchasers, and not as the heirs of the testator; though, in fact, that character may happen to belong to them. If, therefore, under such a devise, two or more sisters prove

(*b*) *Barlow v. Bateman*, 4 338: see *Leigh v. Leigh*, 15 Br. P. C. 194, (folio edit.) Ves. 111.

(*c*) *Pyot v. Pyot*, 1 Ves. Senr.

Rules as to joint-tenancy, and survivorship, with respect to personality.

When interest up to a certain time is not disposed of, it must fall into the residue of a testator's assets.

No apportionment of an annuity, or of dividends, in favor of representatives;

(d) *Swaine v. Burton*, 15 Ves. 370. *Jackson*, 9 Ves. 595.
(e) *Cray v. Willis*, 2 P. Wms. 529; *Whitmore v. Tre-*
lawney, 6 Ves. 134; *Jackson v.* (f) *White v. Williams*, 3 Ves. & Bea. 75.
(g) *Wyndham v. Wyndham*, 3 Br. 59.

but a different rule applies as to the interest accruing upon a mortgage.

Enactments of the statute of distributions, as to bringing into hotchpot advances made to his children by an intestate, in his lifetime.

Favor shewn to the heir at law.

ment of any payment, not actually become due in the lifetime of the first legatee, can be made in favor of his representative (*h*). The same rule applies with respect to dividends upon government securities (*i*): but not to the interest accruing upon a mortgage; which is held to become due from day to day (*k*): or another reason may be assigned, namely, the affinity which interest upon a landed security bears to rent; which is apportionable by statute (*l*).

The statute of distributions (*m*), after saving, by the 4th section, the customs of the city of London, and of the province of York, provides, by the 5th section, that, any child of an intestate, or the representative of any deceased child (not being the heir at law,) who shall have any estate by settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion equal to the share which, by distribution under the said statute, shall be allotted to the other children, shall be excluded from all benefit of such distribution: and if the advancement of such child be not equal to the share which will be due to the other children; then, the child, so partially advanced, shall receive such share of the surplusage of the intestate's estate as will make the estate of all the children equal. But, the heir at law, notwithstanding

(*h*) *Franks v. Noble*, 12 Ves. Atk. 261.
491.

(*i*) *Sherrard v. Sherrard*, 3 Atk. 503; *Wilson v. Harman*, 2 Ves. Senr. 673. (l) Stat. 11 Geo. 2, c. 19, s. 15: see *Aynsley v. Wordsworth*, 3 Ves. & Bea. 334.

(*m*) Stat. 22 & 23 Car. 2, c. 10.

(*k*) *S. C. Pearly v. Smith*, 3

standing any *land* that he shall have, by descent or otherwise, from the intestate, is to have an equal share in the distribution with the rest of the children.

By the act of 29 Car. 2, c. 3, s. 25, the statute of distributions is declared not to extend to estates of *femes covertes* who die intestate; but, that, the husband is entitled to administration of their personal estates; and, should he die without taking out such administration, the wife's next of kin, if they administer, will be trustees for the husband's personal representative(n). It has been decided, that, the provision in the statute of distributions, for bringing into hotchpot all advances to children, applies only to cases of actual intestacy; and, that, where there is an executor, and consequently a complete will, though the disposition thereby made fails, and the executor is declared a trustee for the next of kin, they take as if the property had been actually bequeathed to them: and, consequently, a child cannot be called upon to bring into hotchpot advances received in the parent's lifetime, before such child can claim under the *quasi* intestacy of the parent(o). And, where a child takes under his father's will either real or personal estate, but there is an intestacy as to the residue, the child may take a share of that, without bringing into hotchpot what he took under the will. For, though we have seen, that, a provision by will may be a satisfaction of a portion

The husband is entitled to administration of his wife's personal estate;

and if he die, his representatives beneficially entitled.

The provision in the statute, which requires all advances to children to be brought into hotchpot, applies only to cases of actual intestacy:

And a child may claim a share in any residue undisposed of, without bringing into hotchpot what he took under the will of his parent.

(n) *Cart v. Rees*, cited in *Squib v. Wynn*, 1 P. Wms. 381. (o) *Walton v. Walton*, 14 Ves. 324. See, *ante*, pp. 287, 327.

tion covenanted to be *secured* in the testator's lifetime (*p*); yet, what is taken under a will can never be deemed an actual advancement in the lifetime of the testator; and it is to such advancement only that the provision as to bringing into hotchpot applies (*q*).

A grandchild must bring advances into hotchpot;

as the heir must bring all advances of personality:

When money, expended by an intestate on a real estate given by him to his heir, ought, and when it ought not, to be deemed an advancement.

An advancement may be made by procur-

When a *grandchild*, who claims by representation in right of his deceased parent, has been advanced by the intestate, such grandchild, though not within the letter, is within the spirit of the act, and must bring the advancement into hotchpot (*r*). So, if the heir hath any advancement by money, or personal estate of any kind, that is to be reckoned as part of his share; for, it is only as to *land* that he is exempted by the statute from bringing any advances made to him into hotchpot (*s*). However, if a man after having laid out money on repairs of houses, or improvement of real estate, give such houses or estate to his heir, and then die intestate; the money so laid out cannot be deemed an advancement to the heir. If, indeed, the intestate had irrevocably parted with the premises, and afterwards given his heir a sum of money to ameliorate them, that would have been an advancement (*t*).

Any preferment, ecclesiastic, civil, or military, procured by a parent for his child, is an advancement:

(*p*) *Leake v. Leake*, 10 Ves. Freem. 190.
489.

(*s*) *Pratt v. Pratt*, Fitz-Gib.

(*q*) *Twisden v. Twisden*, 9 84; *Anonym.* 2 Freem. 190.
Ves. 426.

(*t*) *Smith v. Smith*, 5 Ves.

(*r*) *Norton v. Barker*, 2 721.

ment (*u*): as is an annuity, or a reversion (*w*), upon each of which a fair valuation must be made. It is not necessary that the provision should take effect in possession during the father's lifetime: a portion secured *in futuro* is an advancement; and, even if it were only given on a contingency, yet, should the contingency happen, the portion must be brought into hotchpot (*x*).

ing any preferment for a child; or an annuity; or reversion; or even by a contingent provision.

Sir Joseph Jekyll was of opinion, that, the exemption of the heir at law, given by the statute, applied only to the heir at common Law, κατ' ἐξοχήν, and not to a customary heir. He, therefore, decided, that, a youngest son, who, as such, took by descent lands in borough english, should bring them into hotchpot (*y*). Lord Talbot, however, reversed this decree (*z*): and, indeed, in order to maintain the right of the party taking by the custom in such case, it is not necessary to determine whether he is, or is not, such an heir as the statute intended; the case comes within the reasoning of Lord Eldon, who has observed, that, what is taken under an intestacy, by descent, can never be esteemed an advancement by the intestate (*a*).

A younger son, who takes lands in borough english by descent, need not bring them into hotchpot.

The advancement of children is never brought into hotchpot for the benefit of the intestate's widow:

Advances to a child are never brought into hotchpot, except to increase the shares of the rest.

(*u*) *Kirkcudbright v. Kirkcudbright*, 8 Ves. 55, 63; *Colonel Norton's case*, 2 Freem. 190; *Pusey v. Desbouverie*, 3 P. Wms. 317, note.

(*w*) *Edwards v. Freeman*, 2 P. Wms. 442.

(*x*) *S. C.* p. 445: and see

Weyland v. Weyland, 2 Atk. 634.

(*y*) *Pratt v. Pratt*, W. Kelynge, 35; *S. C.* Fitz-Gib. 288.

(*z*) *Lutwyche v. Lutwyche*, Ca. temp. Talb. 276, 280.

(*a*) *Twisden v. Twisden*, 9 Ves. 426.

dow (b): and, in cases upon the custom of London, the effect of advancement by the father is, not to increase the part of the estate of which the father may dispose, but, solely to remove that child out of the way, and to increase the shares of the others (c). So, when a settlement bars, or makes a composition for, the wife's customary share, that will fall into the general residue of the personal estate (d); and not go wholly to the executor of the father (e). The wife's claim, also, is totally excluded by such settlement, whether the husband does, or does not, exercise the power of disposal he thereby acquired; the property will go, at his death, exactly as if there were no wife in existence (f).

A *donatio mortis causâ* has many of the properties of a legacy:

it is not a present absolute gift;

still, as it must be a complete gift

A *donatio mortis causâ* has many of the properties of a legacy; it is liable to debts, and is dependent on survivorship (g): being also a revocable gift, it has been questioned whether it ought not to be held so far testamentary as to be liable to legacy duty (h). It is not a present absolute gift, vesting immediately; but a conditional one, of which the enjoyment is postponed till after the giver's death (i). On the other hand, though liable to be defeated,

(b) *Kirkcudbright v. Kirkcudbright*, 8 Ves. 64.

(c) *Folkes v. Western*, 9 Ves. 460.

(d) *Morris v. Burrowes*, 2 Atk. 629; *Read v. Snell*, 2 Atk. 644; *Knife v. Thornton*, 2 Eden, 121.

(e) *Ives v. Medcalfe*, 1 Atk. 63.

(f) *Pickering v. Lord Stamford*, 3 Ves. 337.

(g) *Tate v. Hilbert*, 2 Ves. Junr. 120; *Jones v. Selby*, Prec. in Cha. 303; *Miller v. Miller*, 3 P. Wms. 357.

(h) *Woodbridge v. Spooner*, 3 Barn. & Ald. 236. See *infra*.

(i) *Walter v. Hodge*, 2 Swanst. 98.

sanced, it must, subject to such revocation, be a complete gift *inter vivos*; and therefore requires no probate (*k*); which seems some answer to the doubt as to its liability to legacy duty, the mode of collecting which is by an *ad valorem* stamp upon probate (*l*). A *donatio mortis causa* differs also from a legacy in this particular,—the subject of gift must in the former case be delivered by the donor; in the latter case by his representative (*m*): and the distinction between a nuncupative will and a *donatio mortis causa* is, that, the bounty given by the former is to be received from the executor; but in the latter case may be held against him, and requires no assent on his part; the delivery having been completed by the donor himself (*n*). The greater number of cases upon this subject have turned upon the question of actual tradition of the gift: the general rule, according to which delivery is necessary, is never now disputed; but, whether such delivery has, or has not been legally completed; or, whether the nature of the gift constitutes an exception, exempting it from the operation of the general rule; still, not unfrequently, presents debateable ground (*o*). Where actual tradition is impracticable, if the donor proceed as far as the nature of the subject admits towards a transfer of the possession, effect may

inter vivos, it requires no probate.

The delivery of a *donatio mortis causa* must be completed by the donor himself.

The question of actual tradition, is that upon which cases of this kind commonly turn:

Where such actual tradition is not practicable, the gift may sometimes take

(*k*) *Ward v. Turner*, 2 Ves. Senr. 435; *Tate v. Hilbert*, *ubi supra*; *Ashton v. Dawson*, Sel. Ca. in Cha. 14.

(*l*) Stat. 55 Geo. 3, c. 184, s. 38.

(*m*) *Walter v. Hodge*, *ubi supra*.

supra.

(*n*) *Duffield v. Elwes*, 1 Sim. & Stu. 244; *Ward v. Turner*, 2 Ves. Senr. 443.

(*o*) *Tate v. Hilbert*, *ubi supra*; *Lawson v. Lawson*, 1 P. Wms. 441.

effect, if the donor transfer possession as far as the nature of the subject admits:

but a mere symbolical delivery will not suffice.

By resumption of the subject of gift, a *donatio mortis causá* is at an end.

may be given to his intended bounty: thus, a ship at sea has been determined to be virtually delivered by a delivery of the bill of sale, defeasible on the donor's recovery: and delivery of the key of a warehouse, or of a trunk, has been held a sufficient delivery of the goods in such warehouse, and of the contents of the trunk: for, in these instances, the bill of sale, and the keys, were not considered as symbols; but as the means of attaining possession of the property (*p*). A mere symbolical delivery will not be sufficient; therefore, there can be no *donatio mortis causá* of a simple contract debt (*q*); though there may of a bond (*r*); for, notwithstanding it is a *chose en action*, some property is conveyed by the delivery (*s*). But, the case of a bond is an exception, not a rule: and where a bond is only a collateral security for a mortgage debt, the delivery of the bond will not be a complete gift of the mortgage (*t*). A cheque on a banker (*u*), or a promissory note (*w*), seems not capable of disposition by way of *donatio mortis causá*: and where there has been a complete delivery of the gift, yet, if the possession be not continued in the donee, but the donor resume it, the gift is at an end (*x*).

An

(*p*) *Brown v. Williams*, cited 2 Ves. Sen. 434; *Jones v. Selby*, as cited 2 Ves. Senr. 441.

(*q*) *Gardner v. Parker*, 3 Mad. 185.

(*r*) *Snellgrove v. Bailey*, 3 Atk. 214; *S. C. Ridgway's Ca. temp. Hardwicke*, 202.

(*s*) *Ward v. Turner*, 2 Ves.

Senr. 442.

(*t*) *Duffield v. Elwes*, 1 Sim. & Stu. 244.

(*u*) *Tate v. Hilbert*, 4 Br. 291.

(*w*) *Miller v. Miller*, 3 P. Wms. 357.

(*x*) *Bunn v. Markham*, 7 Taunt. 232; *S. C.* 2 Marsh.

539.

An interest bequeathed by will may vest in right, although it remains contingent as to the possession. If, indeed, a testator give a legacy expressly upon a contingency, unless that contingency happen the legacy does not vest; but, in the case of an executory devise, the interest of the first taker and that of the subsequent taker vest at the same time (y): the interest is transmissible; and notwithstanding the party in whose favor the executory devise was made, died before the contingency (on which the bequest was to come into possession,) occurred, his representative will be entitled (z).

In the case of an executory devise, the interest of the first taker and that of the donee over vest at the same time:

and the interest of the latter is transmissible.

(y) *Barnes v. Allen*, 1 Br. 347; *Lady Lincoln v. Pelham*, 10 Ves. 175; *Browne v. Lord* 182.

(z) *King v. Withers*, Ca. temp. Kenyon, 3 Mad. 416. Talb. 123; *Anonym.* 2 Ventr.

CHAPTER XI.

*Fraudulent claims in respect of an Intestate's,
or Testator's, Domicil.*

Succession to
personal proper-
ty of intestates,
regulated by the
Law of that
country of which
they were domi-
ciled inhabitants
at their decease:

the *lex loci rei
sitæ* only prevails
when an intestate
had no domicil.

The question of
domicil does not
very often come
before our
Courts;

THE succession to the personal property of in-
testates is to be regulated by the Law of that coun-
try of which they were *domiciled* inhabitants at
the time of their decease; without regard to the
place where the casualty of their death, or of their
birth, happened; or of the situation of the pro-
perty at that time. The *lex loci rei sitæ* can only
prevail when an intestate had no domicil; in which
case, certainly, no good cause could be shewn
why the property should be withdrawn from that
jurisdiction within the limits of which it was actu-
ally situated (a).

From our happy insular situation, the question
of domicil less frequently comes before our own
Courts, than before those of continental Europe;
in many parts of which, owing to the intermixture
of different states, in many instances separated
only by an ideal boundary, the subject is one of
frequent discussion. As little is to be found in
our

(a) *Bempde v. Johnstone*, 3 Ves. 201; *Somerville v. Lord Somerville*, 5 Ves. 786, 791; *Burn v. Cole*, Ambl. 416; *Curling v. Thornton*, 2 Ad-
dams, 15.
Pipon v. Pipon, Ambl. 27;

our own Law upon the subject, Judges have commonly thought it proper to resort to the writings of foreign jurists, for the decision of most of the questions that arise here concerning domicile (*b*). the writings of foreign jurists are commonly resorted to, as affording principles of decision.

The principal reported cases in our own country have arisen with respect to natives of Scotland; in which part of Great Britain the rules as to the distribution of personal property differ from those of England (*c*). If a person domiciled in England die intestate, leaving real estate in Scotland, the heir, if one of the next of kin within the statute of distributions, may claim a share of the personal estate. For though, by the Law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate, so as to form one common subject of division together with the personal estate; yet, in the case put, the English Law must decide the question, and the heir will be entitled to take his share of the personalty, without complying with that obligation as to the real estate (*d*). On the other hand, if an intestate, who was domiciled in England, had granted a *heritable* bond upon his real estate in Scotland, though to secure a debt contracted in England; the Law of Scotland must, in such case, prevail; according to which, real estate is the primary fund for the payment of heritable bonds charged thereon; though **it**

(*b*) *Pottinger v. Wightman*, 3 Meriv. 79.

(*c*) *Brodie v. Barry*, 2 Ves. & Bea. 131. (*d*) *Balfour v. Scott*, stated in 2 Ves. & Bea. 131: see *Hunter v. Potts*, 4 T. R. 192.

it is abundantly clear, that, by the English Law the personal estate is primarily answerable for debts (*e*). In the first of these cases, the Scottish Courts could have no right to interfere with the distribution of personalty, which always follows the domicile; in the latter case, it would be equally improper for an English Court to interfere with real estate situated in Scotland, and the devolution of which ought to be guided by the Laws of that country.

The place, not of a party's birth, but, of his actual and fixed abode, is, *primâ facie*, to be considered as his domicile.

The place of a party's birth is entitled to have but little stress laid on it, in deciding as to his domicile; the place of his actual abode is, *primâ facie*, as to a great many given purposes, his domicile: but if it can be shewn, that, such abode was either constrained, or from the necessity of his affairs, or transitory; all character of permanency, necessary to constitute a domicile, is destroyed. If an intestate had a fixed residence, upon an establishment of his own, in a particular place, and in no other, that residence must be deemed his domicile (*f*).

If a native of Scotland go to the East Indies, in the King's service, no length of residence there, in that capacity, will effect a change of domicile:

the case might be different if he went out in the Company's service:

If a native of Scotland, domiciled there, enter into the King's service and go out to the East Indies as a military officer, his residence there, in that capacity, for whatever length of time, will not effect a change of domicile; and, if he die intestate, his personal property must be distributed according to the Law of Scotland: but if the same individual had gone out to the same station in the Company's

(*e*) *Drummond v. Drummond*, 16. stated in 2 Ves. & Bea. 132; (*f*) *Bempde v. Johnstone*, 3 Elliot v. Lord Minto, 6 Mad. Ves. 202.

Company's service, for the purpose of following a profession there; such a residence would have had the character of permanence, and have created a new domicile (*g*): consequently, as the British territories in the East Indies are considered within the province of Canterbury, his personal effects must have been distributed according to the rules of English Law (*h*). It would be immaterial whether the party had, or had not, left India before his death; if he had subsequently acquired no new domicile: a domicile once established cannot be lost by mere abandonment (*i*).

a domicile is not lost by mere abandonment.

Though we have seen, that, where the question related to two domicils, either of which, as being both British, the deceased was free to elect, there the original domicile *may* be held to have been shifted; yet this cannot be done, even in such case, until the party has, not only acquired another domicile, but, has manifested, and carried into execution, an intention of abandoning his former domicile, and taking another as his sole domicile (*k*). But, the difficulty of a British-born subject shifting his *forum originis* for a *foreign* domicile is, and ought to be, infinitely greater. It may be doubted, whether a British subject can possibly be allowed, by any act whatever, so far "*exuere patriam*" as to select a foreign domicile in *complete* derogation of his

But, though a Briton *may* shift his original domicile, for another which is also British;

the difficulty would be extreme, of allowing him to adopt a foreign domicile, by a total renunciation of his *forum originis*.

(*g*) See, however, a doubt Pull. 229.

intimated as to this in *Attorney General v. Cockerell*, 1 Price, 177. (*i*) *Munroe v. Douglas*, 5 Mad. 405.

(*h*) *Bruce v. Bruce*, and, (*k*) *Somerville v. Lord Somerville*, 5 Ves. 787.
Marsh v. Hutchinson, 2 Bos. &

his British; and nothing but such complete renunciation of his country can render his property in this country liable to distribution according to any foreign law (*l*). If, therefore, an Englishman residing abroad die intestate, leaving property in this country, it by no means follows that the Courts here must, in the distribution of the assets here, defer to the Laws of the country in which the intestate died, though he may have procured letters of naturalization there: and it would be a still less tenable position to hold, that, where a person so circumstanced with respect to domicil has left a will, the invalidity of that instrument according to the law of the country in which the testator, a British-born subject, died, must necessarily defeat its claim to probate in the Courts of this country (*m*).

The domicil of infants is determined by that of the father; or, after his death, by that of the mother; unless a change has been made merely to alter the rule of succession.

The domicil of infants, until they are capable of obtaining one of their own, is determined by that of their father, if he be living; if, after his death, they remain under the care of the mother, they follow the domicil which she may acquire; provided, that, the domicil has not been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession: and such fraud will be presumed, if no reasonable cause can be assigned for the change (*n*).

(*l*) *Curling v. Thornton*, 2 Addams, 17.

(*n*) *Pottinger v. Wightman*, 3 Meriv. 80.

(*m*) *S. C.* p. 19.

CHAPTER XII.

Frauds in which Executors, Administrators, or Guardians, are concerned.

IT is the first duty of all accounting parties, (and, in this respect, executors, administrators, and guardians, as well as all others holding offices of trust, stand in the same situation;) to be constantly ready with their accounts: and if a delay in the just distribution of the property arise, from the neglect or fraud of those whose duty it was to have the accounts forthcoming; that is a clear ground upon which a Court of Equity will act; and the defaulters will be charged with interest upon what they have detained from the parties entitled to it: and, also, made to pay all costs of proceedings rendered necessary by their misconduct (a). For, when an executor, instead of applying the money to the uses of the will, or bringing it into Court, retains his testator's assets in his own hands, after all the purposes which would afford a reasonable ground for its detention are satisfied; it will be presumed, that, he keeps it in order to make his own advantage of it: and he will

Executors, administrators, and guardians, must always be ready with their accounts:

if their neglect cause delay in the distribution of property intrusted to their charge, they will be made to pay interest;

as well as the costs of any proceedings which they have rendered necessary:

(a) *Pearce v. Green*, 1 Jac. & Walk. 140; *Freeman v. Fairlie*, 3 Meriv. 48.

though, as a general rule, an executor is entitled to his costs.

will not only be charged with interest (*b*); but, although it is a general rule, that, an executor is entitled to his costs, yet, in case of misconduct, they may be refused (*c*): or, the executors may even (as we have before seen) be directed to pay costs (*d*). It has, indeed, been said, judicially, that, wherever executors are decreed to pay interest, as for a breach of trust, there costs against them follow of course (*e*): but the unrestrained generality of this rule has, frequently, been denied (*f*).

An executor who neglects to lay out money, directed to be accumulated, must pay interest:

When a testator's will directs his property to be accumulated, his executor, by accepting that office, is bound to pursue those directions, within the limits of Law. If he omit laying out the money where it will be productive, whenever there are competent sums to be invested, he cannot complain though he should be charged with interest according to the most rigid rule (*g*). *A fortiori*, when an executor has drawn sums out of a situation in which they were producing interest, he must, at least, account for that interest (*h*). And, though a Court of Equity will not be disposed to weigh in golden scales the conduct of an executor, even

a fortiori, when he has withdrawn sums from a situation in which they were actually productive.

(*b*) *Dawson v. Massey*, 1 Ba. & Beat. 231.

(*c*) *Newton v. Bennett*, 1 Br. 362; *Caffrey v. Darby*, 6 Ves. 497.

(*d*) *Ashburnham v. Thompson*, 13 Ves. 404; *Crackelt v. Bethune*, 1 Jac. & Walk. 589; *Hide v. Haywood*, 2 Atk. 126.

(*e*) *Seers v. Hind*, 1 Ves.

Junr. 294; *Hall v. Hallett*, 1 Cox, 141.

(*f*) *Sammes v. Rickman*, 2 Ves. Junr. 36; *Newton v. Bennett*, *ubi supra*; *Tebbs v. Carpenter*, 1 Mad. 308; *Ashburnham v. Thompson*, *ubi supra*.

(*g*) *Raphael v. Boehm*, 13 Ves. 592.

(*h*) *S. C.* 13 Ves. 411.

even under an express trust to accumulate; if he appear, upon the whole, to have honestly endeavoured to execute the trust; still, if he have not shewn any disposition to improve the money, he will be considered, as to the principal, to have lent it to himself, upon the same terms on which he could have lent it to others; and, as to the interest, annual rests may be directed, in order to charge him with compound interest; or, even half yearly rests, which will have the effect of giving double compound interest: though extreme cases alone will call for this severity (*i*). An executor, under a trust to accumulate, will not be permitted, when called upon to account, to look back and calculate, whether it would be better for him to abide by that situation in which he ought to have placed himself: if the money has been dealt with in any other way, the account will be taken on that footing, should it appear for the advantage of the *cestui que trust* (*k*).

In extreme cases, compound, or even double compound interest may be given.

It would be too severe, however, to hold, that, an executor who has brought in his account, fairly making a claim which appears to him, and perhaps to the Court also, to be just; but of which he cannot, upon technical rules of evidence, avail himself; should be in the same situation as if he had been guilty of fraud, or negligence, in the execution of his trust. Although the Court, therefore, may feel itself bound to disallow his claim, and

But interest will not be given on a sum which an executor has not paid in upon reasonable grounds.

(*i*) *S. C.* 11 Ves. 107, 111; Ves. 108; *Dornford v. Dorn-Tebbs v. Carpenter*, 1 Mad. ford, 12 Ves. 129; *Bate v.* 300, Scales, 12 Ves. 405.

(*k*) *Raphael v. Boehm*, 11

When an executor allowed interest for money advanced.

and to order the money to be paid in; interest will not be given upon a sum retained under such an honest misapprehension of legal right (*l*). On the other hand, notwithstanding the frequent hardship of such a case, an executor who has advanced money of his own on account of his testator's estate, will be allowed interest upon such advances only from the time of a balance being struck on the general report; for, until that time, it cannot be ascertained that the executor has not money in his hands (*m*).

The usual rate of interest with which executors are charged, is £4 per cent. but, £5 per cent. may be charged:

or, if a further profit has been made, that sum must be accounted for.

And where the property of infants has been embarked in trade by an executor, the infants, when of

The rate of interest, with which executors will be charged, upon balances unnecessarily kept in their hands is, usually, £4 per cent (*n*). But, where there has been a gross breach of trust, £5 per cent. will be charged; for it would be indeed a direct encouragement to executors, who may be in trade, to make use of their testator's property; if they were only to be charged a low rate of interest (*o*): And if it appear, that, more than £5 per cent. has been made of the money, they must answer for that further sum (*p*). For it is a clear principle of Equity, that, if an executor or administrator lend the trust money on personal security, or embark the property of his infant wards in trade; the infants may hold such executor answerable for

(*l*) *Bruere v. Pemberton*, 12 Ves. 391.

(*m*) *Gordon v. Trail*, 8 Price, 416.

(*n*) *Hall v. Hallett*, 1 Cox, 138; *Tebbs v. Carpenter*, 1 Mad. 306.

(*o*) *Crackelt v. Bethune*, 1 Jac. & Walk. 588; *Heathcote v. Hulme*, 1 Jac. & Walk. 135; *Moseley v. Ward*, 11 Ves. 582.

(*p*) *Pocock v. Redington*, 5 Ves. 799; *Piety v. Stace*, 4 Ves. 622.

for all interest received, or accountable for any loss sustained, by risking the money on such security; and, as to money embarked in trade, when they come to full age, they will have an option, either to take the profits, if the concern succeeds; or, if it will be more for their advantage, to reclaim their money, with interest (*q*). And if the funds have been advanced for a partnership, in which the executor was engaged, but the other individuals of which knew the infants to be entitled, if the firm become bankrupt, proof on behalf of the infants may be made against the partnership estate: but, if it would be more for the benefit of the infants to go against the separate estate of the executor, they will be at liberty to do so (*r*).

It is never the inclination of Courts of Equity to discourage persons from acting as executors, by throwing difficulties in their way (*s*); but whenever persons accept the trust of executors, they must perform it: they must use due diligence, and not suffer infants, or others, to be injured by their negligence. For any loss occasioned by *crassa negligentia* on their part, executors are responsible: Thus, when a debt, which might have been recovered, is lost, by default of an executor, he must make the amount good to the estate (*t*): and when he has allowed arrears of rent to accumulate,

age, may elect, either to take the profits, or to reclaim their money with interest.

Courts of Equity never throw difficulties in the way of executors; but, persons accepting a trust of that kind must use reasonable diligence in the performance of it: if, by their default, any loss arise, they must make it good to the estate.

(*q*) *Treves v. Townsend*, 1 Cox, 53; *Adye v. Feuilletau*, 1 Cox, 25; *Rooke v. Hart*, 11 Ves. 60.

(*r*) *Ex parte Watson*, 2 Ves. & Bea. 415.

(*s*) *Freeman v. Fairlie*, 3 Mer. 42.

(*t*) *Powell v. Evans*, 8 Ves. 843; *Lowson v. Copeland*, 2 Br. 157; *Gaskell v. Harman*, 11 Ves. 498.

A difference, made between cases of negligence, and cases of misfeasance.

To what extent assets may be employed in carrying on a testator's trade.

Equity will interfere where executors act *malá fide*; though an entire discretion may have been given to them by will.

A discretion given to an executor, as to the investment of a testator's assets, will be superseded

mulate, and ultimately such arrears are lost, he will be charged therewith (*u*): for, although the default may have arisen merely from negligence, and not from fraud or corruption, still the injury sustained by the devisees is the same. A difference, however, will be made between cases of negligence, and cases of misfeasance, in fixing the rate of interest with which executors should be charged, in respect of any balances retained in their hands (*w*).

When a testator, after disposing of other property, directs, in a general way, that his trade should be carried on; the capital then actually embarked in the trade is all that his personal representatives are authorized in employing in that trade; if they embark more of the assets therein, it is a breach of trust (*x*). If a testator give his executors an entire discretion, whether to exercise, or to omit exercising, an authority given to them by the will; should it appear that they act *malá fide*, a Court of Equity will interfere: but if they honestly address themselves to a sound exercise of that discretion which the testator has thought fit to repose in them; their judgment will not be controlled (*y*). Still, where a testator's will directs, that, his assets shall be invested for the benefit of an infant legatee in "good and sufficient security," (which may seem to give the executor of such will a latitude

(*u*) *Tebbs v. Carpenter*, 1 Mad. 298.

(*w*) *S. C.* p. 307.

(*x*) *Ex parte Richardson*, 3 Mad. 157.

(*y*) *French v. Davidson*, 3 Mad. 402; *Gower v. Mainwaring*, 2 Ves. Senr. 89; *Walker v. Walker*, 5 Mad. 426.

tude as to the nature of the security to be taken,) if it be necessary to administer the estate under the direction of a Court of Equity, the executor's discretion as to the investment is superseded. If, after a decree, and when, consequently, he might have had the directions of the Court, the executor choose to lay out the money on mortgage; should the transaction appear to be for the infant's benefit, the Court will give the infant the advantage of it; but if otherwise, the fund will at least be considered as money, and the executor will be compelled to bring it into Court. After a decree, an executor cannot deal with the assets, for the purpose of investment, without the leave of the Court: and that permission will never, except on special grounds, be extended to the laying out the money on mortgage. If the executor venture to take this step after an order to the contrary, he will be compelled to account for any loss which the estate may sustain by a variation in the price of stock; but, when no order has been made before the money was so lent, and the executor, though he mistook the limits of his authority, appears to have acted under the influence of no improper motive, the Court will not go further than to treat the money laid out, as money in the hands of the executor, which he must pay into Court (x). And even where there has been no decree, nor any previous occasion for the interference of the Court; if executors in trust, relying on a power given them to invest the trust monies, "upon such real

ed, if it become necessary to administer the estate under the direction of a Court of Equity:

After a decree, an executor cannot deal with the assets, for the purpose of investment, without the leave of the Court.

An executor must not lend the assets on the security of a trader's bond:

or

(x) *Widdowson v. Duck*, 2 Meriv. 499. See, *post*, p. 448.

or take upon themselves to call in a real security.

An executor who purchases the estate of an infant devisee, does so at his peril:

And if he take, in his own name, a renewal of a lease devised by his testator, it will be a graft upon the old lease.

on personal security as should seem good and sufficient," accommodate a trader with a loan upon his bond; they must be responsible for any loss occasioned by so imprudent a loan (a): and if it appear, that, they were induced to grant the accommodation from motives of personal connexion with the borrower; the transaction will assume the darker complexion of fraud (b). On the other hand, a Court of Equity will not allow executors to call in a real security, without an inquiry whether that step would be for the benefit of all the parties interested (c): but, in no case, ought they to permit money to remain on personal security (d).

If an executor purchase the estate of an infant devisee, he does it at his peril; he cannot get rid of the bargain, if it prove unfavorable to him; that would be to take advantage of his own wrong: but the infant, on coming of age, may file a bill to have the property restored to him, or resold (e). And if an executor, instead of renewing for the benefit of the devisees of a leasehold estate, whom it is his duty to protect; take a new lease in his own name; it will be a graft upon the old lease (f). Lord Manners thus lays down the principle, to be extracted

(a) *Holmes v. Dring*, 2 Cox, 1.

(b) *Langston v. Olivant*, Coop. 84.

(c) *Howe v. Lord Dartmouth*, 7 Ves. 150; *Orr v. Newton*, 2 Cox, 277; *Walker v. Symonds*, 3 Swanst. 62.

(d) *Powell v. Evans*, 5 Ves. 844: see, post, p. 448.

(e) *Mulvany v. Dillon*, 1 Ba. & Beat. 418.

(f) *James v. Dean*, 15 Ves. 240; *Mulvany v. Dillon*, 1 Ba. & Beat. 419.

extracted from all the authorities on this subject;—
 “wherever a mortgagee, executor, trustee, or tenant for life, gets an advantage, either by being in possession, or behind the back of the party mortgagor, devisee, *cestui que trust*, or remainder-man; he shall not retain the same for his own benefit, but hold it in trust (g).”

Every person who acquires personal assets by a breach of trust, or *devastavit* in an executor, is responsible to those who are entitled under the will, if he be a party to the executor's breach of trust:

Every party to a breach of trust by an executor, is responsible to those who are injured:

Generally speaking, he does not become a party to the breach of trust, by buying or receiving as a pledge for money advanced to the executor at the time, any part of the personal assets; whether specifically given by the will or otherwise; because such sale is, *primâ facie*, consistent with the duty of an executor (h): it is only on the ground of implied fraud, that, such a purchase, or pledge, can be held void in Equity (i): for, it is of great consequence, that, no rules should be laid down by Courts of Equity which would impede executors in their administration; or in any case render their dispositions of the testator's effects unsafe, or uncertain, to a purchaser: but fraud or covin will vitiate any transaction, and turn it to a mere color. If a person, by concert with an executor, obtain the testator's assets at an undervalue;

but the disposal of personal assets is, *primâ facie*, consistent with the duty of an executor.

Any fraudulent concert, however, with the

or

(g) *Nesbitt v. Tredennick*, 1 Ba. & Beat. 46.

(h) *Keane v. Roberts*, 4 Mad. 357; *Mead v. Lord Orrery*, 3 Atk. 239.

(i) *M'Leod v. Drummond*, 14 Ves. 360; *Dickenson v. Lockyer*, 4 Ves. 42; *Nugent v. Giffard*, 2 Ves. Senr. 269; *S. C.* 1 Atk. 463.

executor, will involve a purchaser, or pawnee, of the assets:

One material consideration, in such cases, may be, whether the assets were transferred by the executor in discharge of a previous debt of his own:

And although the *prima facie* presumption will be, that, money advanced at the time of the delivery of the assets, was advanced for the purpose of paying the testator's debts;

or, by collusion with the purchaser, the real value be applied by the executor for his own behoof; or in extinguishing his own private debt; or in any other manner contrary to his duty as executor; such concert will involve the purchaser, or pawnee, and make him liable for the full value (*j*). In estimating the honesty of a transaction of the kind under consideration, one essential ground of distinction is, whether the assets have been applied by the executor to the satisfaction of an antecedent private debt of his own; or whether he assigned them in discharge of, or pledged them as a security for, an advance made to him at the time: for, undoubtedly, suspicion of fraud must always arise, where a party, having a debt previously due to him from an executor, takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character (*k*): and the suspicion will, of course, be strongly corroborated, if the alienee know, at the time, that debts of the testator remain unpaid (*l*). But when a man is applied to for a present loan of money, there is no obvious motive for his making the advance with a view to fraud on the testator's estate: money, therefore, advanced at the time of the delivery, or pledge of the assets, is, *prima facie*, to be considered as advanced to the executor for the purpose of

(*j*) *Scott v. Tyler*, 2 Dick. 725; *Hill v. Simpson*, 7 Ves. 166, 169.

(*k*) *M'Leod v. Drummond*, 14 Ves. 362.

(*l*) *Crane v. Drake*, 2 Vern. 616; *Andrew v. Wrigley*, 4 Br. 137; *Nugent v. Gifford*, 1 Atk. 464; *Taylor v. Hawkins*, 8 Ves. 213.

of paying the testator's debts (*m*). Still, this reasoning is not, in every case, conclusive; if an executor pledge the property of his testator to a banker, in consideration of a loan to be *then* made; should the circumstances shew, that, the banker knew the money was not intended to be applied conformably to the duty of the executor, the Court of Chancery will examine, whether that is not an inequitable transaction, with reference to persons entitled to the testator's property (*n*).

The balance claimed by a guardian from his ward can never be ascertained in a Court of Law; because it depends upon principles peculiar to a Court of Equity; and in order to induce the Court of Chancery to restrain an action at Law brought by a guardian against his ward, it is enough to state the relation in which the parties stand to each other. An unbroken continuance of the management of the property by the guardian, after the ward has attained majority, is, in effect, a continuance of the guardianship, as to the property: and the same principles must be applied to the accounts subsequent, as to the accounts during the period of minority (*o*). And this jealous watchfulness of transactions which, from the relation between the parties, are so open to fraud; has been extended to cases where all accounts were previously settled, and the connexion was at an end;

still, this presumption may be rebutted.

The balance claimed by a guardian from his ward, can never be ascertained, satisfactorily, in a Court of Law.

Where the guardian has continued in the management of the property after the ward has attained his full age;

or even when the connexion has ceased, and the accounts have been settled; they may be overhauled.

the

(*m*) *M'Leod v. Drummond*, 17 Ves. 155.

(*o*) *Mellish v. Mellish*, 1 Sim. & Stu. 145; *Morgan v.*

(*n*) *M'Leod v. Drummond*, 17 Ves. 170; *Adair v. Shaw*, 1 Sch. & Lef. 262.

Morgan, 1 Atk. 488; *Goddard v. Carlisle*, 9 Price, 183.

the transactions impeached appearing to have grown out of the influence arising from the former relation (*p*).

A guardian must not change the nature of his ward's property.

A guardian must not change the nature of his ward's property, without the leave of the Court of Chancery (*q*): and, though an infant cannot bring a bill for an account during his minority, a third person may, on his behalf (*r*).

Whatever part of a testator's property an executor has got possession of, he must be considered as having received *quæ* executor.

An executor will not be permitted, in a Court of Equity, to set up the title of the heir at law, as between himself and the personal representatives of his testator. Whatever part of the testator's property he has got possession of, he must be considered as having received it *quæ* executor. At all events, he cannot assign his uncertainty whether a part of the property be real or personal, as a ground for declining to set forth, in answer to a bill by the personal representatives, what he has done with the property. And as, in a due course of administration, debts are to be paid before legacies; an executor, or administrator, who has paid legacies, cannot, in answer to an application to have the funds brought into Court, be suffered to allege, that, debts are unpaid (*s*). Even where the argument from payment of legacies out of due course

An executor who has paid legacies, cannot resist bringing the funds into Court, by alleging that debts are unpaid:

nor, after the time when the debts ought to

(*p*) *Wright v. Proud*, 13 Ves. 138; *Wood v. Downes*, 18 Ves. 127; *Hatch v. Hatch*, 9 Ves. 296.

(*q*) *Earl of Winchelsea v. Norcliff*, 2 Freem. 96; (see the extract from *Reg. Lib.* annexed to the 2d edit.); *Inwood v.*

Twyne, 2 Eden, 153.

(*r*) *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 119; *Lord Dudley's case*, cited 2 Ves. Senr. 484; *Ware v. Polhill*, 11 Ves. 277.

(*s*) *Freeman v. Fairlie*, 3 Meriv. 35, 38.

course does not arise, still, after the time has elapsed in which all the testator's debts ought to have been paid, an allegation, by the executor, that, some of the debts are unsettled, will not enable him to resist payment into Court of the assets in his hands. To admit such an argument would be to allow him to take advantage of his own fraud, or negligence (*t*). *Laches* will equally be discountenanced in any creditor of a testator; if such creditor lie by for years, and forbear to make his demand when all the other debts were paid, he may thereby enable the executor to obtain fictitious credit, and by so doing postpone his own claims: For instance, if, under such circumstances, a renewal of a lease of the testator's be procured in the name of the executor, and a third person, in reliance on the apparent property in such lease, advance money to the executor, the lease may be taken in execution, for this, the executor's own, debt: and the creditor of the testator will have no sufficient equity in his favor to sustain an injunction (*u*).

have been paid; whether legacies have been paid out of due course, or not.

Laches on the part of any creditor of a testator may oust, or at any rate postpone still further, the claims of such creditor.

When an executor, instead of keeping distinct accounts of his testator's property, as was his bounden duty, has thought fit to mix up the accounts with his own private concerns; whatever inconvenience may arise from the disclosure of the latter, he must submit to it, as the natural result of his own fraud, or folly; and cannot take advantage of his own wrong, to protect himself from producing

An executor who, instead of keeping distinct accounts of his testator's property, has mixed up those accounts with his private concerns; must submit to the disclosure of the latter:

(*t*) *Mortlock v. Leathes*, 2 Meriv. 491; *Gilpin v. Lady Southampton*, 18 Ves. 470; *ston*, 8 Ves. 467: see, also, *Craufurd v. Attorney General*, 7 Price, 76.

Eagleton & Coventry v. Kingston, 8 Ves. 467: see, also, *Ray v. Ray*, Cooper, 268.

and, if the partners of an executor have allowed him to place his accounts as executor in the general partnership books; they cannot withhold an inspection of books.

An executor by payments to simple contract creditors of his testator, makes himself answerable, generally speaking, for payment of debts of a higher nature.

Quære, whether an executor

producing the original accounts, as they stand, with whatever private transactions he may have intermingled them. And if the partners of an executor have permitted him to place his accounts as executor in the general partnership books; it seems, they cannot withhold the free inspection of the books, for the purpose of investigating the accounts of the executorship: certainly, they cannot do so when the executor's answer admits, that, he may have lent to the partnership part of testator's estate, at interest; and that the partners have been dealing with such trust property (*w*).

If an executor, or administrator, venture, prematurely, to pay creditors upon simple contracts, (who cannot be compelled to refund (*x*),) he, thereby, voluntarily takes upon himself all responsibility—to the extent at least of such payments—both as to the sufficiency and security of the assets for the discharge of debts of a higher nature; and he can have no relief in Equity against a bond debt, although he had no notice thereof when he made such hasty payment; unless he was induced to pay away the assets by any fraud on the part of the bond-creditor (*y*): or, perhaps, where the assets were, originally, amply sufficient to answer all demands; but, subsequently to payment of simple contract debts, have perished by inevitable accident (*z*).

It has been a subject of much discussion, whether

(*w*) *S. C. ibid.* p. 43.

Prec. in Cha. 535.

(*x*) *Hodges v. Warrington*,
2 Ventr. 360.

(*z*) *Croft v. Lindsey*, 2
Freem. 1.

(*y*) *Greenwood v. Brudnish*,

ther an executor is bound to discharge legacies, whilst there is a covenant of his testator's outstanding; but which has not been, and possibly never may be, broken. On the one hand, if the executor were allowed to retain the assets, as a provision for this doubtful contingency, the legatees might, in many cases, be unnecessarily, and therefore fraudulently, kept out of their money. On the other hand, injustice would plainly be done to the executor, if he were compellable to pay the legacies, but remained liable to be charged with a *devastavit* for so doing, should the covenant of his testator, at any subsequent period, be broken. In an early case (*a*), (on a suit by executors for prohibition to the Ecclesiastical Court, to prevent an award of payment to legatees,) it was held, by a majority of the Court of K. B. that, an outstanding obligation, not forfeited, was no good plea to a demand of a legacy. Fenner, J., however, doubted this. Lord Coke took this distinction;—when the obligation is for payment of a less sum at a day to come, it will be a good plea against the legatee before the day; for it is a duty *maintenant* which the condition contains. But, where the condition is for the performance of covenants, or to do a collateral thing; there, until it be forfeited, it is not any plea against a legatee; for, peradventure, it will never be forfeited, and may lie *in perpetuum*; and no wills could be performed if such objections availed. In this case, consultation was awarded. In the next year, on an action of debt,

is bound to discharge legacies; whilst there is a covenant of his testator's outstanding; but which has not been, and possibly never may be, broken.

The cases on this subject examined:

Distinction taken by Lord Coke;

(*a*) *Nector v. Gennet*, Cro. Eliz. 467; *S. C. Owen*, 72.

debt, brought against the defendant as executor; the Judges appear to have been divided in opinion as to the validity of a plea, that, the testator was bound in a statute staple in the sum of £1000, conditioned for performance of covenants, and that the defendant had in his hands *nihil ultra*. Fenner, J., held the plea to be "good without question:" but Gawdie, J., as strongly denied this: and the Court is not stated to have come to any decision (b). Half a century later, the same question as in *Nector v. Geanet* was again argued thrice, before the Court of K. B. (c); when Roll, J., intimated, that, it would be a greater inconvenience to enable a testator to defeat, by his will, all his own contingent covenants; than to throw some additional obstacles in the way of the performance of such will: to which it was answered, that, if the testator intended a fraud upon his covenant, it was in his power to effect it, by giving away his goods in his lifetime. This answer was not a very conclusive one; as a man is much less likely to strip *himself* of property, than to give it as wrong direction after his death: and, at all events, the impossibility of preventing one mode of fraud, affords no sound reason for permitting another. The judgment in the case just cited, (if judgment was ever given,) is not reported, by either Styles or Aleyn; but, by Vernon's note to *Lancey v. Fairchild* (d), it seems, that, the decision was in favor of

(b) *Woodcock v. Herne*, 34, 57, 73; *S. C. Aleyn*, 38. *Goldsborough*, 142.

(d) 2 Vern. 101.

(c) *Eeles v. Lambert*, Styles,

of an immediate administration of the assets. Lord Hardwicke, when a similar case came before him, held, that, although whilst it was doubtful whether the condition of a testator's bond, as surety for performance of covenants, remained unbroken, and whilst it consequently was uncertain that any debt would ever arise in respect of such bond; payment by the executor of the testator's simple contract debts would be good: yet, that, this rule did not extend to legacies (*e*).

Lord Hardwicke held, that, Lord Coke's distinction applied only to payment of simple contract debts;

not to payment of legacies.

In this doubtful state of the decisions in our own Courts, it has been found expedient to recur to the principles of the civil Law:—a code which, though it has been objected to, by able constitutional lawyers, as leaving too much to arbitrary discretion; is yet replete with the accumulated stores of collected learning. By the civil Law, a legatary is directed to receive his testator's bounty, upon giving security to make restitution if a better claim should ultimately be established (*f*). This principle has been adopted by our own Legislature, and incorporated into the statute of distributions (*g*): and, in a modern case, Sir William Grant made an analogous decree; directing a legacy to be paid, upon the executors receiving a sufficient indemnity, from the legatee, to secure them, in case their testator's bond should subsequently be forfeited (*h*).

The present doctrine of our Courts, upon this subject, seems to be, that, a legatee shall receive his testator's bounty, upon giving security to refund, if a better claim be established:

This principle is incorporated into the statute of distributions:

and an express decree made on the subject, by Sir William Grant, could hardly be intended to be impugned by an in-

It

(*e*) *Hawkins v. Day*, Ambl. 161: and stated from *Reg. Lib.* in 8 Meriv. 555.

(*f*) As stated in *Nector v. Gennet*, *ubi supra*: and see, *Dig. lib. 5, tit. 8, s. 5; lib. 35,*

tit. 2, s. 73; lib. 39, tit. 2, s. 7.

(*g*) Stat. 22 & 23 Car. 2, chap. 10, s. 8.

(*h*) *Simmons v. Bolland*, 3 Meriv. 554.

cidental observation, which shortly afterwards fell from the same distinguished Judge.

It is true, that, the same Judge, on another occasion, observed, "the Court, sometimes, makes provision for an unascertained debt; as, for instance, where it refuses to make distribution of a testator's estate among residuary legatees, if apprised, that, there are existing claims to which the executors may *eventually* become liable, in respect of *covenants* which their testator has entered into (*i*)."¹ But, as this *obiter dictum* was pronounced only four days subsequent to the judgment in *Simmons v. Bolland*, it is not to be supposed, that, Sir Wm. Grant intended to impugn his own, so recent, decree: His Honor must have meant, that, the Court would not order distribution, unless sufficient indemnity was given to the executors; or, he must have taken a distinction between particular and residuary legatees: a distinction which, in the instance under discussion, would be an unsatisfactory one; and open to all the objections, which have been before stated, that, thereby the residuary interest might be locked up *in perpetuum*. There is no reason to believe, that, Sir Wm. Grant meant to give the high sanction of his opinion in favor of any such doctrine.

An executor cannot protect himself from paying assets into Court, by alleging that he has lent them on personal security.

An executor who admits that he has possessed his testator's property, cannot protect himself from paying the amount into Court, by alleging an improper application of it (*k*): and to lay out the money on personal security is an improper risk; the parties interested in the assets are entitled to have the

(*i*) *Antrobus v. Davidson*, 3 Meriv. 581.

(*k*) *Vigrass v. Binfield*, 3 Mad. 63. See, *ante*, p. 437.

the security of the Court (*l*); or to such security as the Court may direct, when an appropriation of stock would not, with certainty, meet the justice of the case (*m*). If a strong case of fraud, or of imminent danger to property, be charged by a legatee's bill against an executor; and if such charge be also supported by affidavit; a receiver may be obtained on motion, before answer (*n*). And where an administrator, in breach of the bond always given upon taking administration, has not delivered in a "true and perfect inventory of all the goods, chattels, and credits of the intestate," the bond may be assigned to any creditor of the intestate, who may put the same in suit at Law; and will be restrained by injunction in Equity only upon condition, that, the administrator shall confess judgment, which shall stand as security for all the creditor's costs, both at Law and in Equity, and also for payment of his principal and interest, so far as the assets of the intestate will extend (*o*).

A receiver of the assets may be obtained before answer.

Use of administration bond.

It is to be observed, that, when a Court of Equity has taken the management of assets from an executor, it at the same time relieves him from responsibility; and will not permit him to be charged for what has been done in pursuance of its

An executor not responsible for acts done under the direction of the Court:

(*l*) *Wilkes v. Steward*, Coop. 13 Ves. 268; *Anonym.* 12 Ves. 8; *Green v. Pigott*, 1 Br. 105; 5; *Scott v. Becher*, 4 Price, *Carey v. Askew*, 1 Cox, 244: 348.

see, *ante*, pp. 437, 438.

(*m*) *Webber v. Webber*, 1 Atk. 252; *Thomas v. Archbishop of Canterbury*, 1 Cox, Sim. & Stu. 313.

(*n*) *Middleton v. Dodswell*, 399.

but, an executor may be obliged to refund a sum of money recovered by decree, should that decree be reversed.

its directions (*p*). But where an executor has recovered a sum of money by decree, should that decree be reversed, on an appeal brought without *laches*, the executor must refund the money; although he may have paid the amount away in discharge of his testator's debts: The case would be otherwise, if there had been delay in bringing the appeal; the appellant standing by whilst the executor paid away the money, and thus drawing him into a snare (*q*).

Co-executors, by joining, unnecessarily, in receipts for payments made to one of their number, may incur joint responsibility.

But, when an executor has not acted in the trust, he does not become responsible, merely by joining in a receipt.

Co-executors are not obliged to join in receipts, for payments made in respect of their testator's estate; any one of them can give a sufficient discharge. If, therefore, all choose to join, the old rule was, to consider such act as tantamount to an acknowledgment of joint responsibility for the sums so paid (*r*). This rule has been, occasionally, relaxed (*s*); and though it has been repeatedly regretted (*t*), and by no Judge more frequently and energetically than by Lord Eldon, that, such relaxation ever was admitted; yet his Lordship, in a modern case, stated, that, it may now be laid down, that, although one executor has joined in a receipt, yet, whether he is liable shall depend on his acting.

(*p*) *Farrell v. Smith*, 2 Ball & Beat. 342; *Kenyon v. Worthington*, 2 Dick. 669; *Perry v. Phelps*, 10 Ves. 40.

(*q*) *Pooley v. Ray*, 1 P. Wms. 357; *Hercy v. Dinwoody*, 2 Ves. Junr. 93.

(*r*) *Brice v. Stokes*, 11 Ves. 324; *Chambers v. Minchin*, 7 Ves. 198; *Doyle v. Blake*, 2

Sch. & Lef. 242.

(*s*) *Harden v. Parsons*, 1 Eden, 148; *Westley v. Clarke*, *ibid.* 360; *Hovey v. Blakeman*, 4 Ves. 608.

(*t*) *Sadler v. Hobbs*, 2 Br. 117; *Chambers v. Minchin*, 7 Ves. 198; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479.

ing (*u*). Lord Eldon, however, at the same time added, that, the old rule,—by which joining was considered as acting,—was a plain and simple one; but that, in the distinctions made, since the rule that joining alone does not impose responsibility, scarcely two Judges agree. Upon a principle analogous to the old rule as to receipts, it has been decided, that, if one executor in trust, join in a transfer of stock, or do any other act placing the funds at the sole disposal of his co-executor, upon a representation, made by him, that, the money is required for payment of the testator's debts; though the money, in consequence of such negligent act, may come to the hands of one executor only, yet, the other, by joining in such transfer, will have made himself responsible, so far as the proceeds may have been misapplied; but no farther, even although the fraudulent executor may, from a different source, have possessed other funds, which might have been applicable, but which he wasted (*w*).

If one executor place the funds at the sole disposal of his co-executor, who misapplies them; both will be responsible.

Whilst the right to probate is under litigation in the Ecclesiastical Court, as that Court may appoint an administrator *pendente lite*, this circumstance may, in ordinary cases, possibly be a good objection against the interposition of the Court of Chancery: but, wherever fraud stands in the way, so as to prevent the Ecclesiastical Court from acting with effect, there the jurisdiction of Chancery,

Whilst probate is under litigation, circumstances may require the interference of a Court of Equity, to secure the property.

(*u*) *Walker v. Symonds*, 3 *Hinchinbrook*, 11 Ves. 253, 16 Swanst. 64; and see *Langford v. Gascoyne*, 11 Ves. 335. *Ves. 478; Langford v. Gascoyne*, 11 Ves. 335; *Underwood*

(*w*) *Lord Shipbrook v. Lord v. Stevens*, 1 Meriv. 717.

Chancery, indisputably, arises. The object of the suit may be to delay probate, with the intention of keeping, meantime, the property in hands which ought not to retain it: or, it may be proper that a receiver should be appointed, which is a direction the Ecclesiastical Court cannot give, until the suit for probate is finally determined; and that suit may be the subject of appeal, which, even without intention of delay, might necessarily consume much time; during which the property might be wasted (*x*).

Where evidence is admitted, to support, or repel, an executor's claim to a beneficial interest in his testator's assets.

An executor cannot take, beneficially, what the testator meant to dispose of;

The right of an executor to a beneficial interest in the assets of his testator, not expressly disposed of, may be excluded, not only by a plain declaration of trust in the will; but, by circumstances, indicated by the will; in support of which, parol evidence may be given, to raise a presumption of trust; as, on the other hand, the executor may adduce evidence to repel such presumption. But where a conclusive intention is evident on the face of the will, parol evidence cannot be let in, on either side (*y*). The proposition, sometimes alleged, that, the appointment of an executor gives him every thing not disposed of, is not correct. In the strongest way of putting it, he can only take what the testator does not *mean* to dispose of. In the

(*x*) *Atkinson v. Henshaw*, 2 Ves. & Bea. 93, 96; *Ball v. Oliver*, 2 Ves. & Bea. 99; *Jones v. Frost*, 3 Mad. 8; *Rutherford v. Douglas*, in note to 1 Sim. & Stu. 112; *Richards v. Chave*, 12 Ves. 464. Mad. 59; *Lynn v. Beaver*, 1 Turn. & Russ. 68; *Langham v. Sandford*, 2 Meriv. 17; *Giraud v. Hanbury*, 2 Meriv. 153; *Pratt v. Sladden*, 14 Ves. 197; *Walton v. Walton*, 14 Ves. 322; *Rachfield v. Careless*, 2 P.Wms.

(*y*) *Gladding v. Yapp*, 5 160.

the case of a lapse, for instance, though not disposed of, the executor would not take the lapsed bequest. So, if a testator appoint an executor in trust, but omit to express the object of such trust, in that case, the executor will not, by virtue of his office, take beneficially (s). And where a testator leaves a palpably unfinished clause (a); or even where his will closes with an "&c.," this will be understood as an indication, that, he intended a further disposition, in exclusion of the claims of his executors (b). But, no such inference can be drawn from the mere circumstance, that, a considerable space is left blank, between the last legacy given by a will, and the testator's signature (c). Whatever beneficial interest in the residue of a testator's property, two executors, as such, are entitled to; if the property be not reduced into possession before the death of one executor, the whole interest will survive to the other (d). A legacy to one of several executors; or unequal legacies to more than one, will not exclude the legal title, which the executors, as such, have to a beneficial interest in the property of their testator, not disposed of to others; by giving unequal legacies, the testator may have only intended a preference *pro tanto* (e).

though the intended disposition may fail.

An unfinished clause in a will may exclude the executors:

but not a legacy to one of several executors, or unequal legacies to more than one.

But,

(z) *Dawson v. Clarke*, 18 Ves. 254, 255; *Mence v. Mence*, 18 Ves. 351; *Urquhart v. King*, 7 Ves. 228.

(a) *Knewell v. Gardiner*, Gilb. Eq. Rep. 184; *Lord North v. Purdon*, 2 Ves. Senr. 496.

(b) *Bishop of Cloyne v. Young*, 2 Ves. Senr. 91, 99;

Mordaunt v. Hussey, 4 Ves. 118.

(c) *White v. Williams*, 3 Ves. & Bea. 75.

(d) *S. C. ibid. Jackson v. Jackson*, 9 Ves. 595; *Crooke v. De Vandes*, 9 Ves. 204; and see a good reason assigned, at the close of the report of *Cox v. Queenlock*, 2 Freem. 140.

(e) *Rawlings v. Jennings*, 13

Generally, where one executor is, by the gift of a legacy, a trustee as to the residue, the other executors are also trustees.

Quære, whether a reversionary interest will exclude an executor.

Legacies to the next of kin do not exclude them from the residue.

Under a direction, that, an estate devised to infants shall be sold, without

But, wherever one executor is, by the gift of a legacy expressly for his care and trouble, clearly a trustee as to the residue; the other executors are, generally, also trustees: for, since if they take at all, *quà* executors, they take jointly, they must, without special circumstances, all be trustees, or all take the residue beneficially (*f*). Sir William Grant, however, has observed, that, it is not impossible for a testator so to divide the executorship as to give to one the office, to the other the benefit (*g*): and, an infant, being a co-executor, was, accordingly, determined to take the residue beneficially; though the other executor was clearly a trustee.

The learned Judge last named has assigned (what, to an ordinary mind, seem very cogent) reasons, for holding, that, a reversionary interest, after a life interest, would exclude an executor; quite as clearly as a direct and immediate legacy (*h*). Lord Eldon, however, without overruling, has thrown some doubt on this decision (*i*). But, it is now quite undisputed, that, legacies to the next of kin do not exclude *them* from the residue (*k*).

Where an estate has been devised to infants, a direction in the will, that, in case a certain contingent event should happen, the estate shall be sold, without

Ves. 46; *Langham v. Sandford*, 2 Meriv. 22, 17; *Griffiths v. Hamilton*, 12 Ves. 309.

(*f*) *Griffiths v. Hamilton*, 12 Ves. 308; *Williams v. Jones*, 10 Ves. 81; *Sadler v. Turner*, 8 Ves. 623; *White v. Evans*, 4 Ves. 22.

(*g*) *Williams v. Jones*, 10

Ves. 81.

(*h*) *Seley v. Wood*, 10 Ves. 75.

(*i*) *Lynn v. Beaver*, 1 Turn. & Russ. 69.

(*k*) *Griffiths v. Hamilton*, 12 Ves. 309; *Seley v. Wood*, *ubi supra*; *Clennell v. Lewthwaite*, 2 Ves. Junr. 472.

without saying by whom, will not give a power of sale, by implication, to the executors: should the contingency designated arise whilst the devisees still continue minors, the sale must be suspended till they attain their legal majority (*l*). To enable executors to sell, the power must either be expressly given to them, or necessarily be implied from the produce being to pass through their hands in the execution of their office; as in payment of debts and legacies (*m*). Where, indeed, the legal estate has descended upon the heir at law, he may be directed to effect the sale, and distribute the produce, according to the intent of the testator (*n*).

saying by whom, the executors have no power to sell:

such a power must be expressly given, or necessarily implied.

Where the heir at law may be ordered to effect the sale.

The presumption of Law is, that, a testator's personal estate may be got in within a year; and, though there may be many cases in which no diligence could actually reduce the property into possession at the end of a year from the testator's death; yet, constructive receipt by the executors is held equivalent to actual receipt, for the purpose of giving legatees a right to interest; where the testator has not excluded the rule of the Court, by plainly indicating an intention inconsistent therewith (*o*). As a legacy, for the payment of which no other period is assigned by the will, is not due till the end of a year after the testator's death;

Interest on legacies, from the end of the first year after the testator's death:

(*l*) *Patton v. Randall*, 1 Jac. Freem. 136.
& Walk. 196.

(*m*) *Bentham v. Wiltshire*, 4 Ves. 334; *Gaskell v. Harman*, 11 Ves. 498; *Elwin v. Elwin*, Mad. 49.

(*n*) *Locton v. Locton*, 2 8 Ves. 553.

(*o*) *Wood v. Penoyre*, 13

death (*p*); and as interest can only be claimed for non-payment of the legacy by the executor when due; it is an undisputed general rule, that, a legacy carries interest only from the expiration of the time just specified. That general rule, however, has exceptions (*q*); a specific legacy of a *corpus* passes an immediate gift of the fund, with all its produce, from the death of the testator (*r*); and the executor must detain neither. Another exception arises where a legacy is given to the infant child of the testator. The foundations of this latter exception, it has been said, are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge.

But, a specific legacy of a *corpus* is an immediate gift, passing both the fund and its produce:

and where a legacy is given to an infant child of the testator, interest may be immediately payable;

A Court of Equity, therefore, according to the authority cited, concludes that the parent has postponed payment of the principal, solely in respect of this inability to give a discharge, and infers an intention that interest shall be paid immediately (*s*). A more obvious reason, perhaps, is that usually assigned; namely, the helpless imbecility of the infant legatee, and its incapacity to support itself (*t*). That this last is the true ground, may be concluded, from the decisions which have established, that, it is only in cases where

(*p*) *Hearle v. Greenbank*, 3 Atk. 716; *Gibson v. Bott*, 7 Ves. 96.

(*q*) *Raven v. Waite*, 1 Swanst. 557.

(*r*) *S. C. Kirby v. Potter*, 4 Ves. 751; *Barrington v. Tristram*, 6 Ves. 349.

(*s*) *Raven v. Waite*, *ubi supra*; *Crickett v. Dolby*, 3 Ves. 13.

(*t*) *Lowndes v. Lowndes*, 15 Ves. 304; *Heath v. Perry*, 3 Atk. 102; *Mitchell v. Bower*, 3 Ves. 287.

where a child is otherwise unprovided for, that the exception operates: when a father gives a legacy to a child, it will, indeed, (whether it be an absolutely vested legacy, or not,) carry interest from the death of the testator, as a maintenance for the child, where no other fund is applicable for such maintenance (*u*); but where other means of support are provided for the child, then, if the legacy be payable at a future day, it will not carry interest until the day of payment comes, more than in the case of a legacy to a perfect stranger (*v*): and the executor will only do his duty to the testator's general estate by disallowing any claim to interest before that period (*w*). A possible case may occur, in which a testator, having expressly provided maintenance up to a certain period, has left a chasm unprovided for; thus, a father may have given a legacy to a daughter, payable at her age of twenty-one years, and have directed maintenance to be allowed to her till her majority, or marriage, should she marry at eighteen; in such a doubtful case as to the intention, a Court of Equity will lean to the inference, that, the father did not mean his child should have nothing in the interval between her marriage, and the period when the legacy was payable; and reasonable maintenance will be allowed (*x*).

If the child be otherwise unprovided for.

In a doubtful case, Equity will lean to the inference, that a parent did not intend his child to be without support.

The

(*u*) *Cary v. Askew*, 1 Cox, 244; *Harvey v. Harvey*, 2 P. Wms. 22. *suprà*; *Hearle v. Greenbank*, 3 Atk. 718.

Wms. 22.

(*v*) *Wynch v. Wynch*, 1 Cox, 435; *Ellis v. Ellis*, 1 Sch. & Lef. 5; *Heath v. Perry*, *ubi*

(*w*) *Tyrrell v. Tyrrell*, 4 Ves. 5.

(*x*) *Chambers v. Goldwin*, 11 Ves. 2.

Interest on a legacy not given to an adult, or to an illegitimate child, before the time of payment arrives:

or to an infant grandchild, unless the testator has put himself in *loco parentis*.

No maintenance out of a legacy, which, in certain events, is given over.

The general rule as to non-payment of interest upon a legacy, before such legacy becomes due, must not be broken in upon by an exception in favor of an adult legatee, however nearly related to the testator (*y*); and, *a fortiori*, not in favor of illegitimate children (*z*), (who in legal contemplation are mere strangers (*a*),) unless it can be collected, as a necessary inference from the whole will, that, the testator intended to give interest (*b*). Even in the case of a grandchild, an executor must not take upon himself to pay interest upon a legacy, by way of maintenance, when it is not expressly provided by the will: for, though, it has been said, Courts of Equity will struggle in favor of the grandchild (*c*); yet, it seems, there must be something more than the mere gift of a legacy, something indicating that the testator put himself in *loco parentis*, to justify a Court in decreeing payment of interest on such legacy, for his maintenance (*d*). It would be a still greater excess of an executor's authority, if he were to pay interest, by way of maintenance, upon a legacy to his testator's grandchildren, when such legacy is not given absolutely, and in all events; but, subject to certain contingencies, upon which it is bequeathed over: in such

(*y*) *Raven v. Waite*, 1 *Waite, ubi supra*.
Swanst. 558.

(*z*) *Perry v. Whitehead*, 6 *12; Greenwell v. Greenwell*, 5
Ves. 547. Ves. 194; *Collis v. Blackburne*,

(*a*) *Lowndes v. Lowndes*, 15 *9 Ves. 470*.
Ves. 804.

(*b*) *Beckford v. Tobin*, 1 *Ves. 547; Rawlins v. Goldtrap*,
Ves. Sear. 310; *Ellis v. Ellis*, 5 *Ves. 443; Hill v. Hill*, 3.
1 Sch. & Lef. 6; *Raven v. Ves. & Bea. 186*.

(*c*) *Crickett v. Dolby*, 3 Ves.

12; *Greenwell v. Greenwell*, 5

Ves. 194; *Collis v. Blackburne*,

9 Ves. 470.

(*d*) *Perry v. Whitehead*, 6

Ves. 547; *Rawlins v. Goldtrap*,

5 Ves. 443; *Hill v. Hill*, 3.

Ves. & Bea. 186.

such case, even a Court of Equity would not hold itself competent to decree interest (*e*). In the most favored case, that of children,—if the words of the will do not authorize the application of interest to the maintenance of infant legatees, a Court of Equity never goes farther than to say, that, if it can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance (*f*); or, where there is no gift over, and all the children of a family are to take equally, and under the same limitation; there, although other children may possibly come *in esse* after the order made, yet, all the children, born or to be born, will be held to have a common interest, and, therefore, the interest of the fund, as far as it may be required, will be applicable to maintenance (*g*). But, if the will contain *successive limitations*, under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the Court; for none of the living may be the parties eventually entitled to the property. In such a case, an order for maintenance might be, in effect, to give to one person the property of another (*h*). Where all the possible legatees over are *in esse* and *sui juris*, there, of course, if they consent,

Even in favor of children, if the words of the will do not authorize the application of interest for maintenance, Equity will (in general) not make the order, unless all the individuals who may become entitled are before the Court.

Exception to this rule.

(*e*) *Lomax v. Lomax*, 11 Ves. 48; *Errington v. Chapman*, 12 Ves. 25.

(*f*) *Errat v. Barlow*, 14 Ves. 203; *Marshall v. Holloway*, 2 Swanst. 436.

(*g*) *Errat v. Barlow*, 14 Ves. 204; *Haley v. Bannister*, 4 Mad. 280.

(*h*) *Marshall v. Holloway*, *ubi supra*; *Ex parte Kebble*, 11 Ves. 606.

Principal of an infant's fortune applied for his benefit.

sent, no difficulty will arise in obtaining an allowance for maintenance (i). And, where it is to be collected from any part of the will, that, the testator intended maintenance should be paid; mere general expressions, in a particular proviso, will not defeat that intention (k). Sometimes, (but very rarely,) maintenance will be allowed out of the principal of an infant's fortune. For the purpose of putting a child out in life, the principal is more frequently applied (l): and, in proper cases, the executor may safely do this without an application to the Court (m).

A wife not entitled to interest before the legacy is payable.

There is no exception admitted, in favor of the testator's wife, to the general rule, that, a legacy does not bear interest before it is payable (n).

An executor in trust not usually allowed compensation for his trouble:

Generally speaking, an executor in trust cannot claim compensation for personal trouble and loss of time in the performance of trusts under a will, however onerous the duties: if the nature of the trust be such as to make a compensation proper, a special case ought, regularly, to be made to a Court of Equity, before the trust is accepted (o). There is, however, high authority for making a retrospective allowance to an executor, as a compensation

(i) *Fairman v. Green*, 10 1 Jac. & Walk. 253; *Harvey*
Ves. 48; *Errat v. Barlow*, 14 v. *Harvey*, 2 P. Wms. 22.
Ves. 203.

(k) *Lyddon v. Lyddon*, 14 369.
Ves. 567, citing, *Hall v. Carter*, 2 Atk. 358.

(l) *Walker v. Wetherell*, 6 (n) *Stent v. Robinson*, 12
Ves. 474; *Swinnock v. Crisp*, Ves. 461; *Raven v. Waite*, 1
2 Freem. 78; *Ex parte Green*, Swanst. 559.

(o) *Brocksup v. Barnes*, 5 Mad. 90.

sation for his labor and time, employed in the execution of the trusts of his testator's will (*p*).

And an executor who has acted as such in India, on passing his accounts in the Court of Chancery here, will be allowed commission upon his pay-
but, an executor who has acted in India allowed commission :

ments and receipts, according to the practice in *India* (*q*): when no legacy has been given to such executor (*r*). But this is an exception to the general rule; if a person, who has been constantly in the habit of acting as factor during the life of his principal, be appointed executor, he cannot claim commission money as factor, for business done after he accepted that office, or, at any rate, only in respect of goods consigned to him before the testator's death (*s*). An executor, who is also a surviving partner of his testator, can claim no allowance for his management of the co-partnership trade subsequently to the death of the testator (*t*).
a factor, or a surviving partner, made executor, cannot claim commission.

The personal estate of a party who has contracted a debt by mortgage, is applicable to its discharge, in favor either of the heir, or the devisee of the mortgaged estate (*u*); provided other creditors would not, by such an arrangement, be deprived of their just debts (*w*). But, notwithstanding this right of the heir, or devisee, if either of
If the heir, or devisee, induce the executor to
 them,

(*p*) *Marshall v. Holloway*, 2 Swanst. 453.

(*q*) *Chetham v. Lord Audley*, 4 Ves. 74.

(*r*) *S. C. p. 75; Freeman v. Fairlie*, 3 Meriv. 28.

(*s*) *Scattergood v. Harrison*, Moseley, 130.

(*t*) *Burden v. Burden*, 1 Ves. & Bea. 172.

(*u*) *Robinson v. Gee*, 1 Ves. Senr. 252.

(*w*) *Galton v. Hancock*, 2 Atk. 431; *Manning v. Spooner*, 3 Ves. 118.

employ the personal assets in payment of legacies, neither can afterwards assert a claim conflicting with that distribution.

them, by even a parol assurance that he will not raise the claim, induce the executor to pay legacies; it would be a fraud, which could hope for no countenance, in a Court of Equity, if the heir or devisee were afterwards to call on the executor to exonerate the real estate, out of the personal assets. The claim would be barred; not only if the assets had been distributed on the faith of such an engagement previously made; but even if the distribution had merely received the subsequent approbation of the heir or devisee (x).

In what cases an executor must act as such to entitle him to a legacy:

Legacies expressly given to executors, in consideration of the care and trouble which may be required in the execution of the testator's will, of course, cannot be claimed, where the duties, with which they were connected, have been renounced (y). And, if a legacy be given to a man *as executor*, whether it is expressed to be for care and pains, or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor (z). The burthen of proof, that a legacy was intended for an executor in a distinct character, rests with him: the *primâ facie* presumption is, that, it is given to him as executor (a). But, where a legacy is given, not merely in contemplation of future services, but also, in token of regard, and no actual *laches*, by refusing or neglecting to accept

and in what instances he may be entitled to the legacy before he has acted, if he have not refused to accept the trusts of the will.

(x) *Clinton v. Hooper*, 1 Ves. Junr. 185.

(z) *Harrison v. Rowley*, 4 Ves. 216; *Read v. Deraynes*,

(y) *Freeman v. Fairlie*, 2 Meriv. 31; *Humberston v. Humberston*, 1 P. Wms. 333.

3 Br. 95.

(a) *Stackpoole v. Howell*, 13 Ves. 421.

accept the trusts of the testator's will, is made out, the legacy cannot be withheld, upon an apprehension of a subsequent breach of duty (*b*). And, a legacy, given in such terms as those last stated, cannot possibly be forfeited by the death of the executor before he has acted, to any but a very trifling extent, in the execution of the will: or, it is presumable, even although he had not acted at all, if he had no fair opportunity of doing so, but had not manifested any intention to renounce the trust (*c*).

A debt due by an executor to the estate of his testator forms part of such testator's assets; for the same plain reason upon which an executor, or administrator, who is a creditor, may retain; namely, because he cannot sue himself (*d*). And this right is not prejudiced by the infancy, or lunacy, of the party entitled to administration: a retainer of what is due to him will be valid, notwithstanding that, on account of his incapacity, administration has been granted to another (*e*).

Rule as to debts due from an executor to his testator's estate: and *vice versa*.

Under special circumstances, as, for instance, when an executor becomes insolvent, or colludes with persons indebted to his testator's estate, a creditor of the testator's may be allowed to prosecute a suit against the debtors (*f*).

When a creditor may prosecute a suit against a testator's debtors.

Notwithstanding

- | | |
|---|---|
| (<i>b</i>) <i>Brydges v. Wotton</i> , 1 Ves. & Bea. 134. | <i>lips</i> , 2 Freem. 11. |
| (<i>c</i>) <i>Harrison v. Rowley</i> , 4 Ves. 215; <i>Parsons v. Saffery</i> , 9 Price, 583. | (<i>e</i>) <i>Franks v. Cooper</i> , 4 Ves. 764. |
| (<i>d</i>) <i>Simmons v. Gutteridge</i> , 13 Ves. 264; <i>Berry v. Usher</i> , 11 Ves. 90; <i>Phillips v. Phil-</i> | (<i>f</i>) <i>Burroughs v. Elton</i> , 11 Ves. 36; <i>Alsager v. Rowley</i> , 6 Ves. 750; <i>Doran v. Simpson</i> , 4 Ves. 665. |

Admission of
assets not always
conclusive.

Notwithstanding an executor has improvidently admitted assets, in his answer to a bill by creditors, or legatees, it is within the jurisdiction of the Court, to permit him to go to account; upon a strong and clear case made out that the admission was a mistake (*g*). As a general rule, however, an executor who has once admitted assets is held bound by such admission (*h*).

Practice, where
legacies are given
to infants.

Formerly, an infant legatee was obliged to file a bill against the executor, who could not safely pay the legacy without a decree: but, under the act of 36 Geo. 3 (*i*), the executor has only to pay the money into Court; and the infant when of age may petition for it: thereby saving great expense to the residuary legatees (*k*).

Relief against
executors:

In cases of fraud the remedy does not die with the person committing it, but the same relief may be had against his executor, to the extent of the

In special cases,
proceedings
against them go
on, both at Law
and in Equity.

assets (*l*). In ordinary cases, proceedings against executors or administrators, both at Law and in Equity, at the same time, would be inadmissible: but, when the personal representative is disposed to give a preference, by confessing judgments, a creditor may obtain leave to make a *special* election; namely, to proceed at Law to recover judgment, with a stay of execution; and likewise to proceed in Equity for a discovery and account of assets.

(*g*) *Young v. Walter*, 9 Ves. 365.

(*h*) *Roberts v. Roberts*, 2 Dick. 574.

(*i*) Cap. 52, s. 32.

(*k*) *Whopham v. Wingfield*, 4 Ves. 631: and see *Anonym.*

4 Mad. 228.

(*l*) *Garth v. Cotton*, 3 Atk. 756.

assets (*m*). A legacy due from an executor who admits assets, is, in Equity, a *debt* due from such executor; within the statutes of bankrupts, also, it is a debt, and one to which the doctrine of *set-off* is applicable (*n*).

A legacy may be a subject of set-off.

Administration granted by a Court of a foreign country, cannot be taken notice of in the Courts here, as to the disposal of property situated in this country (*o*); but, where a testator has left no estate in England, it is not necessary that the will should be proved here by the executor (*p*); nor that administration should be taken out here, to a party who has died intestate, with respect to personality, which, at the time of his death, was within a colonial jurisdiction, and of which possession has been obtained by virtue of an administration there granted (*q*). Whenever administration has been granted irregularly, or has been obtained by fraud or surprise, though such administration be voidable, yet acts done thereunder, before it is actually avoided, will be valid; and it is by suit in the Spiritual Court which granted it, that the power of administration ought to be repealed (*r*). Though, if the Ecclesiastical Judge will not pursue

Effect of administration granted by the Court of a foreign country:

or by a colonial jurisdiction.

Acts done under powers of administration irregularly obtained are valid, until those powers are repealed:

how that repeal is to be obtained.

(*m*) *Barker v. Dumaresque*, 3 Atk. 119.

(*p*) *Jauncy v. Sealy*, 1 Vern. 397.

(*n*) *Jeffs v. Wood*, 2 P. Wms. 131; *Walcot v. Hall*, 2 Br. 306.

(*q*) *Currie v. Bircham*, 1 Dowl. & Ryl. 37.

(*o*) *Tourton v. Flower*, 3 P. Wms. 370. See, *ante*, p. 430.

(*r*) *Harrison v. Mitchell*, Fitz-Gibbon, 304; *Blackborough v. Davis*, 1 P. Wms. 43.

sue the Law, when appealed to, a *mandamus* may issue; but, it seems, that, until the Spiritual Court has actually erred in this respect, the Court of ordinary jurisdiction will not anticipate any probability of such erroneous judgment(s). But, where administration has once been granted regularly in all respects, it is not competent to the Ecclesiastical Courts to repeal it, on the ground that it has been abused; it was their business to have taken sufficient security, in the first instance, to have guarded against mal-administration: and if the person to whom they have improvidently granted administration be wasting the assets, it is only by an action of *devastavit*, or, in proper cases, by a bill in Equity, that such fraud can be corrected (t).

The Ecclesiastical Courts cannot repeal administration, once regularly granted; even though the power be abused:

what remedy may be had in such case.

Bonâ fide payments to one clothed with powers of administration, will be protected.

A plaintiff suing as executor, under a probate fraudulently obtained, is liable to costs.

Bonâ fide payments to an executor who has obtained probate of a forged will; or to an administrator who has obtained letters of administration by fraud, will be protected: for, if actions had been brought in such cases, the debtors could not have made any defence (u). But, with respect to an executor himself, who has surreptitiously obtained probate of a revoked will, and, under that authority, has commenced a suit or action; if the probate be afterwards recalled by the prerogative Court, the costs of the cause will be thrown upon the party who so improperly instituted the proceedings:

(s) *Blackborough v. Davis*, 1 219; *Hill v. Bird*, Aleyn, 56. P. Wms. 47, 48.

(u) *Allen v. Dundas*, 1 T.

(t) *Thomas v. Butler*, 1 Ventr. R. 131.

ceedings (*w*): he cannot shelter himself under the statute (*x*), which only protects, from costs of not proceeding to trial, a plaintiff suing as executor, who has obtained probate without fraud; and who has been guilty of no *laches*.

(*w*) *Shaw v. Mansfield*, 7 (*x*) Stat. 14 Geo. 2, c. 17.
Price, 714.

CHAPTER XIII.

Fraud in Matters of Trust.

When trust monies have been wasted, the trustee's assets may be marshalled:

WHEN the receipt of trust monies has not been acknowledged under hand and seal (*a*), a breach of trust is usually considered as a simple contract debt, chargeable upon the personal estate only of the trustee (*b*): but the assets may be marshalled, and the *cestuis que trust* decreed to stand in the place of specialty creditors, if these latter exhaust the personalty (*c*).

and, trust monies may be followed into land, when they are clearly shewn to have been employed in a purchase of that kind:

In giving relief against the misappropriation of trust-funds, the great difficulty has always been, as to following money into land. The Court of Chancery, Lord Hardwicke observes, has been very cautious of doing this; but has done it in some cases. No one, his Lordship adds, will deny, that, the Court should follow the money, if it were actually proved to have been laid out in land: the doubt with the Court, in these cases, has been as to the proof; there is difficulty in receiving parol proof; that might let in perjury; but money has

parol evidence to prove this fact is not inadmissible.

(*a*) *Gifford v. Manley*, Ca. temp. Talb. 110; *Deg v. Deg*, 2 P. Wms. 414.

(*b*) *Vernon v. Vawdrey*, 2 Atk. 119.

(*c*) *Cox v. Bateman*, 2 Ves. Senr. 19: it may be observed, that, in this case, the real estate was in Ireland.

has always been followed into land, when the fact has been admitted by the answer of the party who so invested the money: His Lordship concluded, by referring it to the Master to inquire, whether, in the case before him, lands had been purchased with the trust monies (*d*): thus, in fact, deciding in favor of the admission of parol evidence. Sir Thomas Clarke, M. R. had previously made, though with reluctance, a similar order; and, on receiving the Master's report that trust monies had been invested in land, declared, that, "the money ought to be considered in the same plight and condition as if it had not been invested; and subject to the same trusts and limitations (*e*)."
 In the course of the discussions upon these cases, two other precedents (*f*) were cited, in which similar inquiries were directed; and one case (*g*), in which Sir John Strange, M. R., declared the land to be liable, without directing a previous inquiry. On the other hand, three cases were relied on (*Kirk v. Webb* (*h*), *Halcot v. Marchant* (*i*), and *Kinder v. Milward* (*k*),) in which the *cestuis que trust* could obtain no relief: but, in the two first of these cases, it should be observed, there was no express proof, that, the lands were bought with the trust monies; had that been

Precedents in favor of this rule;

and the cases impugning it, examined.

Express proof must be given that the lands were bought with the trust monies:

(*d*) *Lane v. Dighton*, Ambl. 413; *Ryall v. Ryall*, 2 Atk. 59: and see *Taylor v. Plumer*, 3 Mau. & Sel. 574.

(*e*) *Lane v. Dighton*, Ambl. 412, 413.

(*f*) *Balguy v. Hamilton*, reported, but not as to this point, in *Moseley*, 187, and *Jones v.*

Jones; of which no further report has been found.

(*g*) *Hardacre v. Massenger*, not reported.

(*h*) 2 Freem. 230; Prec. in Cha. 84.

(*i*) Prec. in Cha. 168.

(*k*) Prec. in Cha. 172.

made

this was not
clearly made out
in the case of
Kirk v. Webb.

Where there
are personal as-
sets, it may be
unnecessary to
follow the trust
monies into land.

Lord King, C.
was of opinion,
that trust monies
could not be fol-
lowed into land;

unless the trustee
had owned, by
deed, the receipt
of the money, and
his investment
thereof:

made out, Sir John Trevor, M. R., was of opinion, that, the decisions might have been different: and, in the third case, the Master of the Rolls decreed in favor of the *cestui que trust*; though, it is true, the Lord Keeper, Wright, reversed that decree: but this reversal is of little weight, as it was made, professedly, upon the authority of *Kirk v. Webb*; which case, we have seen, wanted one of the indispensable requisites for enabling a Court of Equity to follow trust monies into lands; as it was not there made out, that, the trust monies (l) had been employed in the purchase. It could afford, therefore, no sound precedent, for a case in which such proof of the investment was given. Indeed, when, in another case, the same last-named Judge refused to follow trust money into lands; he did so on other, and less untenable, grounds; assigning as his reason, that, in the case before him, such relief was unnecessary; there being no deficiency of personal assets of the trustee, to answer the demands of the *cestui que trust* (m). Lord King, C., did, it is true, lay it down broadly, that, if a receiver of rents should invest all the monies in a purchase of land; or, if an executor should realize all his testator's assets; and, in either case, the party so misapplying the money should afterwards die insolvent; yet a Court of Equity could not charge the land: His Lordship admitted, however, that if a trustee owned, *by deed*, the receipt of the money, and that he had laid out the same in the purchase

(l) *Denton v. Davies*, 18 Ves. 518.

502; *Perry v. Phelps*, 17 Ves.

183; *Lench v. Lench*, 10 Ves.

(m) *Heron v. Heron*, Prec. in

Chā. 163: but see, *post*, p. 472.

purchase of lands; this would amount to a declaration of trust, and raise a specific *lien* upon those estates (*n*). His Lordship's difficulty, therefore, was not as to the principle, but as to the mode of proving the preliminary fact. But, whatever doubt may have been formerly entertained on this subject; it seems now quite settled, not only that money may, in this manner, be followed into land, but that a claim of the kind may be supported by parol evidence (*o*); for trusts *by implication*, or operation of Law, are not within the statute of frauds (*p*); if they were, that statute would tend to promote frauds rather than prevent them (*q*). Nor is it, in any case, necessary that a trust should be created by writing; the provisions of the statute are satisfied if the trust be manifested by a subsequent writing (*r*). but the admissibility of parol evidence seems now established:

Still, although personalty misapplied by a trustee may be traced into the purchase of land, and parol proof of that fact is allowable; it does not follow, that, in all cases, if the proof of the conversion be satisfactory, the lands purchased must belong to the *cestui que trust* of the money with which it was purchased: the personal estate so misapplied may, as to the right owner, retain the character trusts by operation of Law are not within the statute of frauds.

(*n*) *Deg v. Deg*, 2 P. Wms. 414: and see *Gifford v. Manley*, Ca. temp. Talb. 109; *Ambrose v. Ambrose*, 1 P. Wms. 321.

(*o*) *Lench v. Lench*, 10 Ves. 517.

(*p*) Stat. 29 Car. 2, c. 3.

(*q*) *Young v. Peachy*, 2 Atk. 256, 257; *Willis v. Willis*, 2 Atk. 71; *Anonym.* 2 Ventr. 361.

(*r*) *Forster v. Hale*, 3 Ves. 707; *S. C.* on appeal, 5 Ves. 315: See the 7th. section of the Statute of Frauds.

Where land has been purchased by a trustee, partly with his own, and partly with trust monies; the *cestui que trust* will have a *lien* upon, but not a title to, the lands so purchased:

A trust need not be created by writing.

character of personal property, chargeable indeed upon, and demandable out of, real estate so bought; but it may only constitute a *lien* upon, not give a title to, the estate itself: to this limited extent the equity of a case must, plainly, be confined, when an estate shall appear to have been purchased by a trustee, partly with his own and partly with trust monies (*s*). But, if the purchase be made exclusively with the funds belonging to the *cestui que trust*, it would appear to be most consonant to the general principles of Courts of Equity, that, the *cestui que trust* should be at liberty to elect, whether he will take the estate, or have the money restored, with interest: for, the impropriety of speculation, by one whose duty it is to secure the property for the right owner, is, surely, not done away by his choosing to speculate in *land*, rather than in commerce; and the rule is well established, as to an executor (*t*), (and the principle is equally applicable to any other trustee (*u*),) that, if he will take upon himself to act, with regard to the property he holds as executor, in any other manner than his trust requires, he puts himself into this situation, that he cannot be a gainer by it: any gain made must be for the benefit of the *cestui que trust*.

it would be different, seemingly, if the whole purchase was made with trust funds.

The possession of the trustee is the possession of the *cestui que trust*:

As the possession of the trustee is the possession of the *cestui que trust*; so long as the relation continues

(*s*) *Lewis v. Maddocks*, 17 Ves. 58; *Savage v. Carroll*, 1 Ba. & Beat. 285.

(*t*) *Piety v. Stace*, 4 Ves. 622; *Forrest v. Elwes*, 4 Ves. 497; *Ex parte James*, 8 Ves. 350; *Rocke v. Harte*, 11 Ves.

60; *Heathcote v. Hulme*, 1 Jac. & Walk. 131; *Adye v. Feuilleteau*, 1 Cox, 25.

(*u*) *Bate v. Scales*, 12 Ves. 405; *Sanderson v. Walker*, 13 Ves. 603; *Ex parte Lacey*, 6 Ves. 629.

tinues unbroken by any act, adverse or otherwise, putting an end thereto; so long the trustee is bound to protect the interest of the *cestui que trust*; without the necessity of any interposition on his part: and the length of time during which he has omitted to discharge his trust, can form no bar to his responsibility. The mischief of a purchase from a *cestui que trust* is always great; but it would be monstrous, if the trustee could fix a price, and buy the estate from himself, tacitly, without a word said to his *cestui que trust*; and then contend, that, he had placed himself in the situation of an owner by adverse title; and, that, by lapse of time, the estate had grown into his absolute property. If a case of this kind be alleged, inquiries will, almost after any length of time, be directed, to ascertain the facts, and do what Equity may prescribe (*w*). And although the circumstances may not afford such palpable evidence of fraud, yet, whenever a trustee purchases the estate of his *cestui que trust*, such a transaction is so open to abuse, that, it cannot (except in very special cases,) be sustained in Equity (*x*): and the application of this principle will not depend upon any nice inquiry whether the sale was, or was not, fairly conducted (*y*); if such an investigation were thought necessary, before any bargain, obtained by persons standing in situations of influence and trust,

and, whilst the relation continues unbroken, length of time will not bar the trustee's responsibility;

or set up an adverse title in him.

A purchase by a trustee of the estate of his *cestui que trust*, can in very few instances be supported:

(*w*) *Chalmer v. Bradley*, 1 Meriv. 208.

Jac. & Walk. 67: and see infra, pp. 476, 478.

(*x*) *Morse v. Royal*, 12 Ves. 372; *Downes v. Grazebrook*, 3

(*y*) *Randall v. Errington*, 10 Ves. 428; *Ex parte Bennett*, 10 Ves. 385.

for the broad rule is, that, no man must sell to himself.

If a trustee for an infant wish to purchase the trust estate, he can do this safely, only by application to a Court of Equity:

If the *cestui que trust* be an adult, by express agreement with him, the trustee may qualify himself to become the purchaser.

Quære, whether a trustee may buy the valid title of a third person to lands devised (by infirm title), to his infant *cestui que trust*?

trust, could be set aside; the ingenuity of fraud might, in many cases, elude detection (z): but the broad rule is, that, no man shall sell to himself. The only way in which a trustee can protect his purchase of property belonging to infant *cestui que trust*, (when he sees it is absolutely necessary the estate should be sold, and he is ready to give more than any one else,) is, to file a bill, and apply to the Court, by motion, for permission to become the purchaser. If he made a sufficient case, a Court of Equity would, not break through its rule, but, take the party out of the operation of the rule, by divesting him, *quoad hec*, of his character of trustee (a). If the *cestui que trust* be an adult, and in all respects a free agent, by express agreement with him the trustee may become the purchaser of the trust estate: or he may altogether divest himself of the character of trustee, and thus qualify himself to become the purchaser. But, whilst he continues to be a trustee, he cannot, without express authority from his *cestui que trust*, have any thing to do with the trust property as a purchaser (b). It has, indeed, been said, that, if the title to lands devised, or descended, to an infant, be *re verâ* in a third person; the trustee or guardian of the infant may buy in the title of such third person; and, that, this shall not be taken to be a trust for

(z) *Parkes v. White*, 11 Ves. 226; *Whichcote v. Lawrence*, 3 Ves. 752; *Hatch v. Hatch*, 9 Ves. 297; *Lister v. Lister*, 6 Ves. 632.

(a) *Campbell v. Walker*, 5

Ves. 681; *Sanderson v. Walker*, 18 Ves. 303.

(b) *Downes v. Grazebrook*, 3 Meriv. 208; *Woodhouse v. Meredith*, 1 Jac. & Walk. 222.

See, *post*, p. 479.

for the infant (c). It is presumed, however, this can only be law when the reality of the third person's title has been judicially determined; and this without any collusive management, or *laches*, on the part of the trustee. If the question of title was at all disputable, who was to dispute it, after the trustee had deprived himself of the power, or, at all events, of the inclination to do so (d)?

However, where a trustee, or other party holding a confidential situation, has purchased the interests of a party whom it was his duty to protect; after he has been allowed to remain in possession a length of time, as absolute owner, without impeachment of his purchase, (the *cestui que trust* lying by, and laboring under no legally acknowledged disability to maintain his claims,) the delay may materially affect the title to relief against such purchase: for the *laches* may, in itself, be unjust, and contrary to equity and good conscience (e): the property may have passed through the hands of many innocent purchasers, who, relying upon the undisturbed possession, have, under that idea, laid out considerable sums of money in improvements (f): but, of course, if notice of the trust be charged, and proved, the fact that there have been *mesne* assignments will not affect the equity to set aside the transaction (g). Generally speaking, however, when a party has been guilty of such

Where a trustee has been allowed to remain, for a length of time, in possession of an estate purchased from one whom it was his duty to protect; the delay may affect the title to relief against such purchase:

Generally speaking, the *laches* which would bar a legal title, will bar an equitable claim.

(c) *Lesley's case*, 2 Freem. 52. *Rorke*, 2 Sch. & Lef. 672.

(d) *Combes v. Throckmorton*, cited *ibid*.

(e) *Chalmer v. Bradley*, 1 Jac. & Walk. 62; *Webb v.*

(f) *Bonney v. Ridgard*, 1 Cox, 149.

(g) *Attorney General v. Lord Dudley*, Cooper, 146.

laches

Even in cases tainted with fraud,

length of time may bar the justest claims, where there has been possession under an adverse title; though all the time an outstanding legal estate has been vested in a naked trustee:

it would be different if the possession had been in one who entered under the trust:

and who had never denied the real title.

laches in prosecuting his equitable title, as would bar him if his title were solely at Law, he will be barred in Equity (*h*). Even in cases of fraud, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle, that, *expedit reipublicæ ut sit finis litium*; although the statutes of limitations, it has been held, do not apply to any equitable demand, Courts of Equity adopt them; or, at least, generally, take the same limitations for their guide, in cases analogous to those in which the statutes apply at Law (*i*). But though length of time may bar the justest claims, where there has been possession under an adverse title; and the mere fact that there has been, all the time, an outstanding legal estate vested in a naked trustee, will not vary the case (*k*); (for that would be, in effect, to determine that no equitable estate could ever be barred by length of time:) still, when the possession has been—not, constructively, in a mere naked trustee, but—actually in one who entered under, and by virtue of the trust; his possession cannot be considered as adverse to the real title; to which, therefore, such possession will be referred (*l*). But, if such trustee refuse to render any account of the proceeds

(*h*) *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Cholmondeley v. Clinton*, 2 Jac. & Walk, 139: see qualifications of the rule, under the head of "Settlement, Conveyance, &c."

(*i*) *Stackhouse v. Barnston*, 10 Ves. 467; *Bonney v. Rid-*

gard, 1 Cox, 149.

(*k*) *Cholmondeley v. Clinton*, 2 Jac. & Walk. 146, 175; *Harmood v. Oglander*, 6 Ves. 217.

(*l*) *Cholmondeley v. Clinton*, 2 Jac. & Walk. 170: and see, *suprà*, p. 472, *et infra*, p. 478.

proceeds of the estate, and, also, deny the title of the *cestui que trust*; from the period of such denial, his possession must, necessarily, be looked upon as adverse; the statute will begin to run, and if relief is not sought within the time thereby prescribed, the equitable estate will be as conclusively barred as a legalestate, under similar circumstances of *laches* would be (m): for though, to constitute a title by disseisin, a wrongful entry may, in legal strictness, be required (n); still if the negligent owner has forfeited his right to recover; the estate, whether legal or equitable, must either devolve on the Crown; pass by escheat; become an *hæreditas jacens*, to which no one can lay claim; or, it must belong to the actual possessor: the Law has decided in favor of the latter claim, and settled that twenty years adverse possession gives a positive title to the defendant in a possessory action: it is not only a bar to the action or remedy of the plaintiff, but takes away his right of possession (o): it follows, as a necessary corollary, that he will have lost every pretence of title, by the expiration of the time allowed for bringing a writ of right, before he begins to pursue that form of action. But, should a person who has obtained possession of an estate by fraud, subsequently procure an assignment of *elegits* affecting the estate; and then levy a fine thereof, he will gain no title by virtue of such fine, and non-claim thereon: his possession,

at

To constitute a title by disseisin, a wrongful entry may, in legal strictness, be required; but where the negligent owner has forfeited his right to recover, the estate will remain with the actual possessor; though he may have been, originally, a trustee.

A fine levied by a person whose possession is not necessarily adverse, will operate nothing.

(m) *Fishar v. Prosser*, Cowp. & Sel. 275.
218.

(o) *Taylor*, on demise of *At-*

(n) *Doe v. Perkins*, 3 Mau. *kyns, v. Horde*, 1 Burr. 119.

Equity will set
aside a fine for
fraud and covin:

or, rather, con-
sider all who
have wrongfully
taken an estate
by such fine as
trustees.

at the time of levying the fine, will be referred to his title under the *elegits*; and not to his tortuous freehold gained by disseisin: his fine, therefore, will operate nothing; there being, in contemplation of Equity, no adverse possession (*p*): for wrongful possession will never be imputed, where it can be referred to just title (*q*). And if there were any doubt as to the legal operation of such a fine; there is still another ground upon which a Court of Equity would set it aside, as it would any other conveyance,—and that is, fraud and covin (*r*). Or, it would be more correct to say, not that Equity would absolutely *set aside* a fine fraudulently obtained, but, that, it would consider all those who have wrongfully taken an estate by such fine, as trustees for the persons defrauded; and decree a reconveyance; on the general ground of laying hold of the ill conscience of the parties, and making them do what is necessary for restoring matters to their former situation (*s*).

Whilst we are upon the subject of limitation of actions, it may not be irrelevant to notice, that, it has been said, if a person has been prevailed upon, by artful promises not to prosecute his claim, till his

(*p*) *Conroy v. Caulfield*, 2 Ba. & Beat. 272.

(*q*) *Gregory v. Mitchell*, 18 Ves. 333; *Buckmaster v. Harrop*, 13 Ves. 474; *Kennedey v. Daly*, 1 Sch. & Lef. 378; *Clinan v. Cooke*, 1 Sch. & Lef. 41; *Morphett v. Jones*, 1 Swanst. 181: and see, *ante*, p. 476.

(*r*) *Conroy v. Caulfield*, 2 Ba. & Beat. 272.

(*s*) *Wilkinson v. Brayfield*, 2 Vern. 307; *Hubbard v. Gillibrand*, cited in 1 Roll's Rep. 115, 116; *Pickett v. Loggon*, 14 Ves. 234: and see the head of "Frauds in matters of Conveyance:" and also the chapter on "Lunacy."

his debt is barred at Law by the statute of limitations; it might be a serious question, whether a plea of the statute would avail the fraudulent defendant (*t*). This hesitating observation of Lord Manners must, it is presumed, be understood only with reference to the particular Irish statute to which his Lordship was adverting: at all events, it seems inapplicable to our English statute (*u*) for limitation of personal actions; under which such promises as those suggested would create a new *assumpsit*; and the debt would not be barred even in a Court of Law.

Every fresh promise of payment creates a new *assumpsit*.

A trustee may, as we have seen (*w*), come to an agreement with his *cestui que trust*, that, with reference to a proposed contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que trust*: and if the trustee prove, that, through the medium of such an agreement, he had, previously to the purchase, evidently, distinctly, and honestly, removed himself from the character of trustee; his purchase may be sustained (*x*). But, although the adjudged cases admit, that, a man may shake off the confidential character of trustee, to determine, in any case, whether he has done so effectually, may frequently be difficult (*y*): and this fact will be investigated with

It is not impossible for a trustee to remove himself from his confidential situation, with respect to a particular purchase transaction;

but he may find it difficult to prove that he did effectually shake off the character of trustee;

(*t*) *Barrington v. O'Brien*, 1 Ba. & Beat. 178.

(*u*) Stat. 21 Jac. 1, c. 16. See the distinction between this statute, and the Irish statute of 8 Geo. 1, c. 4, stated in *Maddock v. Bond*, Irish T. R. 333, 335.

(*w*) *Ante*, p. 474.

(*x*) *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Grazebrook*, 3 Meriv. 208.

(*y*) *Ex parte Bennett*, 10 Ves. 394.

and although the connexion has been really dissolved, yet, if information, acquired whilst it lasted, has been withheld from the former *cestui que trust*, this concealment will vitiate the contract for purchase:

and the question of acquiescence can never arise, till it is first shewn, that the *cestui que trust* knew all the facts.

A trustee must not set up a nominal purchaser, when he is, in fact, treating with his *cestui que trust* for himself.

with the jealousy obviously required, to guard against the common infirmity of human nature, which will in very few instances permit a man to divest himself of that regard for his personal advantage, which might be incompatible with the duty imposed upon him by his office of trustee: the connexion may, indeed, have been dissolved; but if, during its continuance, the trustee acquired any information relative to the value or improveable nature of the property; and has failed to give the fullest information on that head to his *cestui que trust*; such concealment would vitiate any contract obtained by the trustee for the purchase of the estate (z). And though long acquiescence might bar the remedy of the defrauded party, in this, as in every other case; yet the question of acquiescence can never arise, till it has been previously ascertained, that, the *cestui que trust* knew the facts, constituting a fraud upon his rights: as long as he continued ignorant of those facts, there could be no *laches* in not quarreling with the sale upon those special grounds (a). Admitting that a trustee may purchase from his *cestui que trust*, if the latter, being fully aware who is the intended purchaser, and neither pressed by undue influence, nor laboring under any deception, is willing to deal with him (b); still, it can never be suffered, that, a trustee should set up a nominal purchaser, and deal with his *cestui que trust* in the name of that

(z) *Ex parte Lacey*, 6 Ves. 626; *Coles v. Trecothick*, 9 Ves. 248; *Oliver v. Court*, 8 Price, 161, 164.

(a) *Randall v. Errington*, 10 Ves. 427.

(b) *Morse v. Royal*, 12 Ves. 373.

that person; while he is clandestinely treating for himself (c).

Courts of Equity look with great jealousy on the conduct of trustees, more particularly where infants are the *cestuis que trust*: and where a person has the arrangement and management of two estates, in one of which he is interested personally, in the other as trustee, he will not be allowed to refer an engagement, into which he has entered, to one account, or the other, as he may think fit, after he has seen the probability of its turning out advantageously, or otherwise. If he has once embarked the infant's property, although no part of such trust money has actually been laid out, the trustee cannot abandon the contract on the part of the infant, and take it on his own behalf: for any profits made he must account; whether he must answer for any loss, or not, will depend upon his authority so to employ the trust funds; and the diligence and honesty with which he has conducted the transaction (d).

The conduct of trustees is looked at with peculiar jealousy, where infants are the *cestuis que trust*;

One general rule obtains with respect to trustees, of every description, as well as to tenants for life; namely, that, if, from being in possession, they have an opportunity of renewing a leasehold interest, such renewal will be considered a graft upon the old lease (e): they must not obtain a reversionary lease for their own use only (f); but whatever

Every renewal of a lease obtained by a trustee in possession, will be a graft upon the old lease;

(c) *Woodhouse v. Meredith*, & Beat. 419; *James v. Dean*, 1 Jac. & Walk. 222. 15 Ves. 240.

(d) *Wilkinson v. Stafford*, 1 Ves. Junr. 42. (f) *Pickering v. Vowles*, 1 Br. 198; *Randall v. Russell*, 3

(e) *Mulvany v. Dillon*, 1 Ba. Meriv. 196.

whatever advantages they obtain by such means, they must hold in trust (g): as purchasers from them, with notice, must likewise do; if relief be sought without great *laches* (h). Still, where there has been no contrivance or management, in fraud of those who were interested in the old lease; and where such old lease, and all the trusts respecting it are absolutely determined; and there is neither any remnant of the old lease; nor any tenant right of renewal upon which a new lease could be considered as a graft; there, the party who was trustee, is, *quoad hoc*, no longer in that situation; the fiduciary character is necessarily terminated for want of an object; the trust, as to this subject, is expired; and there is no ground for excluding the *quondam* trustee, (who in this respect is such no longer,) from becoming a purchaser of the property for his own benefit (i). And where a trustee, even during the existence of a trust as to the leasehold interest, purchases the reversion in fee; although it may be objected, that, by this means, he debars the *cestui que trust* of a fair chance of a renewal; yet this circumstance, alone, will not be sufficient to convert the purchase of the inheritance, into a mere graft upon the leasehold interest (k). Upon similar principles, though a counsel would disgrace his situation if he should avail himself

But, where the old lease, and all the trusts respecting it, are absolutely expired;

there is no ground for excluding the trustee from treating for the property for his own benefit.

And even during the existence of a trust as to the leasehold interest, the trustee may purchase the reversion in fee, on his own account:

for a purchase of the inheritance cannot be con-

(g) *Nesbitt v. Tredennick*, 1 Ba. & Beat. 46; *Rushworth's case*, 2 Freem. 12.

(h) *Parker v. Brooke*, 9 Ves. 587; *Senhouse v. Earle*, Ambl. 288; *Cordwell v. Mackrill*, 2

Eden, 347.

(i) *Stokes v. Clarke*, Colles' P. C. 193.

(k) *Randall v. Russell*, 3 Meriv. 197; *Hardman v. Johnson*, 3 Meriv. 352.

himself of information, which he obtained as trustee for tenants for life, or years, to procure from the right heir a conveyance of the reversion in fee, for his own benefit: still, much as a Court of Equity would disapprove such a transaction; and desirous as it might be to consider him a trustee only; it would not be warranted in doing so, in favor of tenants for life, who took nothing in the inheritance (*l*). Whether such a dealing would, or would not, be impeachable by the vendor, must depend on the special circumstances.

verted into a graft upon leasehold, or life interests.

If a copyholder bequeath his copyhold on trust, and the trustees will not apply to be admitted; and the heir also declines to be admitted *as such*; whereby a forfeiture accrues; should the heir then procure a new grant to himself, this would plainly appear to be a fraud intended to get rid of the trust: and the facts appearing on the court rolls, a purchaser from the heir (who is bound to search the rolls as far back as is necessary for ascertaining his title,) would be affected with notice, and, in Equity, be himself considered as a trustee (*m*).

A new grant of a copyhold, contrived for the purpose of getting rid of a trust attaching upon the former grant, cannot be held otherwise than in trust.

It is the duty of trustees to afford their *cestui que trust* all the information of which they are, or ought to be, in possession; a trustee may involve himself in serious difficulty, by want of information which it was his duty to obtain: and he who, undertaking to give information, gives but half information; in the doctrine of Equity, conceals. When, therefore, a *cestui que trust* is induced, by imperfect

It is the duty of a trustee to afford his *cestui que trust* full information as to the subject matter of the trust:

(*l*) *Norris v. Le Neve*, 3 Atk. 38.

(*m*) *Pearce v. Newlyn*, 3 Mad. 189.

a neglect of this duty may involve him in personal responsibility.

imperfect information of the trustees, to enter into a compromise of his claims; the compromise, as far as respects the trustees, is invalid; unless subsequently ratified and confirmed by the *cestui que trust*, when laboring under no disability or influence, and with a full knowledge of all the circumstances: the party may proceed against all, or any, of the trustees; and this not only if steps are taken as soon as the *cestui que trust* comes of age; but the protection of a Court of Equity will be continued until he has had means of acquiring full information. And although the trustees may, by the very act complained of, be placed in a more disadvantageous situation, as to relief over, against third persons, than they would have been, had that act not taken place; yet, if the circumstances are such, that the act may be considered as the trustees' own act, rather than that of the *cestui que trust*, the inconvenience which the trustees may thus suffer will not bar relief: they must bear the consequences of their own improper conduct (n).

No interest derived from a breach of trust can be retained,

unless the *cestuis que trust*, deli-

When trustees depart from that rule of conduct which their duty prescribes to them, neither they, nor those who claim under them, with notice, can sustain an interest derived from their breach of trust (o): the *cestuis que trust* are not called on to prove actual injury, in order to enable them to set the transaction aside. But if, with a full knowledge

(n) *Walker v. Symonds*, 3 Swanst. the several points, in the order here stated, will be found confirmed by Lord Eldon's judgment, reported in pp. 58, 73, 64, 75, 69, 61.

(o) *Garth v. Cotton*, 1 Dick. 200; *Adair v. Shaw*. 1 Sch. & Lef. 262; *Phayre v. Perce*, 3 Dow, 129.

ledge of all the circumstances, and when under no legal disability or undue influence, the *cestuis que trust* deliberately confirm the acts of the trustees, they are estopped from complaining of those acts subsequently, as far as their own interests are concerned; though, of course, if the *cestuis que trust* be only tenants for life, they cannot, by their confirmation, conclude the interests of those in remainder (*p*).

If a person accept the office of trustee of a marriage settlement, by which property is intended to be secured for the separate use of the wife, during the joint lives of the husband and wife, with remainder to the survivor; but subject to a power of joint appointment, reserved to them in the settlement: any private agreement between the husband and the trustee, that the property should be held liable to make good the engagements of the husband with the trustee, would be fraudulent against the other parties to the settlement. And, the whole property being subject to a power of appointment, capable of defeating all right of survivorship; if that power be executed, the argument that the husband might, at any rate, make his chance of survivorship liable to his debts, could not, in such case, be of any effect. The trustee would be bound to carry the appointment into execution; without himself setting up, or allowing any one else to set up, any thing to defeat it (*q*).

And where a creditor of the husband, by suppress-

ing And if a man, by fraud, procure himself to be

(*p*) *Bowes v. East London Water-works*, 3 Mad. 383.

(*q*) *Morris v. Clarkson*, 1 Jac. & Walk. 111.

made a trustee for a *feme covert*, his private object being to pay himself, out of the trust fund, a debt due to him from her husband; Equity will not allow him to reap the fruits of such imposition.

However fully a discretionary power of management may be given to trustees, if they omit doing what would be plainly beneficial, they will be answerable.

A general power of distribution given to trustees, cannot be interfered with, except in the case of a general trust for charity.

ing the fact that he has any such demand, but with a view of repaying himself out of the wife's separate property, procures himself to be appointed one of her trustees; thus becoming ostensibly a trustee for the *feme covert*, but in reality for his own benefit; a Court of Equity will not allow him to reap the fruits of his imposition, by reverting to his character of creditor, and setting up (so as in any way to affect the separate estate of his *cestui que trust*,) the debt which he had suppressed (*r*).

A power given to trustees to renew a lease, in settlement, "as occasion may require, and as they may think proper," does, indeed, give them a discretion; but not an arbitrary and capricious discretion; a Court of Equity will judge whether it be exercised properly, for the interests of the *cestui que trust* (*s*): if they omit to renew, when a renewal would be evidently beneficial, they will be answerable for a breach of trust; although they may not have derived any personal advantage from the neglect (*t*). Where trustees have a general power of distribution as to the trust funds, according to their discretion, without any particular object pointed out, or rule laid down, a Court of Equity cannot interpose; unless in the instance of a general trust for charity. But, where a rule is laid down, and the objects of bounty designated, so that the discretion is to be exercised, and the judgment

(*r*) *Dalbiac v. Dalbiac*, 16 Ves. 487.
Ves. 124.

(*s*) *Lord Milsington v. Lord Mulgrave*, 3 Mad. 493; *Webb v. The Earl of Shaftesbury*, 7

(*t*) *Lord Montfort v. Lord Cadogan*, 17 Ves. 489; *S. C.* on appeal, 19 Ves. 638; *Adair v. Shaw*, 1 Sch. & Lef. 272.

judgment determined upon matters of fact; such a judgment can be as well exercised and acted upon by a Court as by the trustees; and, if necessary, the case will be referred to a Master (*u*). If the trustees of a marriage settlement, empowering them to advance to the husband a sum of money, upon receiving a written consent of the wife, attested by two witnesses; take upon them to advance the money without such consent: they cannot justify this breach of trust by alleging a *subsequent* approbation of the wife. For, the actual advance of the money to the husband, who, perhaps, may be unable to return it, would create an unfair pressure upon the judgment of the wife, giving to her subsequent approbation a very different character from the free consent required by the settlement (*w*).

In what case a wife's subsequent approbation will not be equivalent to her previous consent to a disposal of money settled upon her.

It is an undoubted maxim, that, no one can be compelled, in Equity, to answer questions having a tendency to convict himself of a criminal offence (*x*): if, therefore, it be alleged by bill, that, a trustee has sold a living belonging to his *cestui que trust*, the trustee may demur to any discovery that would tend to fix him with simony, which, in the eye of the Law, is a crime. And even in the examination of witnesses, in such a cause, a Court of Equity would exclude all questions having no object but to prove simony: but, if the object of such questions be to prove payment of money,

No one is compelled in Equity to give any answer tending to convict himself of a criminal offence:

but where the questions put to a witness are to

(*u*) *Gower v. Mainwaring*, 1 Mad. 99.

Ves. Senr. 89; *Walker v. Walker*, 5 Mad. 427: see *infra*, p. 493.

(*x*) *Ex parte Symcs*, 11 Ves. 525.

(*w*) *Bateman v. Davies*, 3

prove payment of money, they must be answered; though the effect may be to prove simony.

If a trader employ trust funds in a partnership business, the *cestui que trust* is a creditor of the joint estate.

A lease of charity estates for an unreasonable term, or containing improper covenants for renewal, is bad;

as it is, if granted by a corporation to one of their own body, at less than the full rent.

ney, though the effect of the answer may be to prove simony, such questions cannot be excluded: for no considerations will induce the Court to declare, that, a trustee may so deal with the trust property, as to be at liberty to state what he has done, only to a certain extent; and yet, that, the *cestui que trust* must rest satisfied with the imperfect information, which is all the trustee thinks fit to give (*y*).

Those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust; therefore, if a trader employ the funds of his *cestui que trust* in the joint trade of his partners and himself, with their knowledge, the *cestui que trust* may, on the bankruptcy of the firm, prove against the joint estate (*x*).

Leases of charity estates for an unreasonable term, and without an adequate consideration, are, by a series of decisions, determined to be bad (*a*): *a fortiori* they are so if they contain a covenant for perpetual renewal (*b*): in all such cases fraud is inferred, and the lessee is held to be a trustee.

If a corporation, acting as trustees of a charity, demise part of the charity estate to one of their own body, at a lower annual rent than might have been obtained from another responsible tenant; it would be impossible for the lessee to support such a lease, if

(*y*) *Parkhurst v. Lowten*, 2 Swanst. 211, 215.

(*z*) *Ex parte Heaton*, Buck, 387: and see *post*, under the head of "Bankruptcy."

(*a*) *Attorney General v. Moses*, 2 Mad. 308.

(*b*) *Attorney General v. Brooke*, 18 Ves. 326.

if he was aware of the circumstances under which it was granted (c). Sir William Grant, M. R., once said, that, it had never been decided, from what period a corporate body should be obliged to account in matters of trust: but, that, at all events, it never could be competent to trustees, of any description, to say, they would account only from the time when a demand was made. His Honor also intimated, that, to assimilate the cases of a trust account and a common account, by decreeing, in the former case as well as in the latter, the account to be taken only for the period of six years next before the bill filed, would clearly be improper. Though, of course, no account can be decreed for any period antecedent to that at which the title of the plaintiffs actually before the Court (or of those under whom they claim) accrued (d). If estates be devised upon trust to apply the profits thereof for the relief of poor inhabitants of a parish, (not being a corporation,) and the parish officers, who are appointed as acting trustees during the time they are in office, misapply those profits in any year; an account, and satisfaction for the breach of trust, must, in Equity, be sought against the individuals who committed it; and not against their successors in office; a parish being a fluctuating body, not at all similar to a corporation. But, with a view to the prospective interests of the charity, a reference may be had to a Master of the

The common limitation of accounts does not apply to cases of trust accounts.

If annual officers of a parish misapply funds left in trust for the poor, satisfaction can only be sought against them personally, not against their successors in office:

but a reference may be had to a Master for the future regulation of the trust.

(c) *Ex parte Greenhouse*, 1 Mad. 109: and see the chapters of this work appropriated to "Charity," and to "Landlord and Tenant."
(d) *Attorney General v. Brewers' Company*, 1 Meriv. 498. See, post, p. 493.

the Court, to approve of a scheme for the future regulation of the trust (*e*).

A purchaser under a trust for payment of debts generally, is not obliged to see to the application of the money:

but, he is, if the debts be specified:

the safest course he can pursue in such case.

Rule when a devisee in trust, is also indebted as a co-obligor to his testator's estate.

The doctrine is well settled, that, when a sale is made under a trust, or devise, for payment of debts generally, without a specification of the debts in a schedule; a purchaser is not obliged to see to the application of the money: this rule is in support of the trust, as it facilitates the sale. But, if there be a specification of the debts, a purchaser is bound to look to the application of the money; and must either take assignments from the creditors (*f*), or he may apply to a Court of Equity to have the money paid into the Bank, under the direction of the Court, and not taken out without notice to him: this last is the safest course, and obviates, moreover, all possibility of fraud upon the trust, through collusion between the trustees and the purchaser (*g*).

If a general devisee, in trust, be also indebted by bond, jointly with two others, to the testator's estate; the three co-obligors cannot, by a transaction between themselves, agree that one shall be discharged, and the whole security rest upon the two, without the privity of the executor; where the testator has named one; and, although slight evidence of the executor's assent might support an actual and *bond fide* payment to the trustee, yet, that principle could not apply to the case put, which

(*e*) *Ex parte Fowler*, 1 Jac. & Walk. 73; *French v. Dear*, 5 Ves. 547; *Lanchester v. Thompson*, 5 Mad. 12: see, *post*, title "Charity."

(*f*) *Lloyd v. Baldwin*, 1 Ves. Senr. 173.

(*g*) *Binks v. Lord Rokeby*, 2 Mad. 239.

which would be, not receiving the money, but, lessening the security (*h*).

In a case where trustees joined, collusively, with a remainder-man in putting the tenant for life of the trust estate out of possession; and, before the tenant for life was restored to her rights, some of the occupiers of the land became insolvent; the trustees were decreed to make good, not merely what the tenant for life would, under the circumstances, have actually received, had her possession been uninterrupted; but, all she was entitled by her contracts of lease to receive (*i*). If, on the other hand, trustees to preserve contingent remainders collude with the tenant for life, and permit him to commit waste, in fraud of those in remainder; the trustees will be responsible for such breach of trust (*j*).

Responsibility of trustees who have colluded with a remainder-man to oust the tenant for life:

or who have colluded with the tenant for life, and enabled him to commit waste.

It would, in ordinary cases, be a fraud in mere trustees to preserve contingent remainders, to concur in the destruction of those very interests, the protection of which was the sole object of their appointment (*k*): but where they join in the destruction of contingent remainders, without any fraudulent motive, after the first tenant in tail has attained the age of twenty-one years; this may be only in furtherance of such a fair and reasonable family arrangement as a Court of Equity, even if it hesitated

In ordinary cases, trustees to preserve contingent remainders must not concur in destroying those interests:

but, fair family arrangements may justify the act, after the first tenant in tail is of age:

(*h*) *Dickenson v. Lockyer*, 4 10 Ves. 278. See the head of Ves. 44. "Waste," *ante*, p. 233.

(*i*) *Kaye v. Powell*, 1 Ves. Junr. 408.

(*k*) *Mansell v. Mansell*, 2 P. Wms. 680; *Biscoe v. Perkins*,

(*j*) *Garth v. Cotton*, 3 Atk. 753; *Stansfield v. Habergham*, 1 Ves. & Bea. 491.

and if the trustee be also the tenant for life, he may join in barring the entail.

In a suit respecting trust property, if the trustees, and the party in whom the first estate of inheritance is vested, are before the Court, all who come after will be bound by the decree.

A discretion given in the largest terms to trustees, must be exercised fairly; although they may be empowered to sell "at such time as they shall think fit,"

tated to direct the act, would not deem a culpable breach of trust (*l*). *A fortiori*, when the trustee is not merely such, but is, also, tenant for life of the estate, he will not be esteemed guilty of a breach of trust in joining with a remainder-man in tail to bar the entail: for the policy of the Law always favors the free alienation of property (*m*). And it is an established rule, that, however numerous the contingent limitations of a trust may be, it is sufficient in a suit respecting the trust property, to bring the trustees before the Court, together with the party in whom the first inheritance is vested; and all that come after will be bound by the decree, even though they were not *in esse* at the time it was made; unless there be fraud and collusion between the trustees and the party having the first vested estate of inheritance; such fraud or collusion would unravel the transaction, not only in Equity, but at common Law (*n*).

It is a clear principle, that, no fraudulent, or dilatory, dealing by trustees shall be allowed either to benefit themselves (*o*), or to affect third persons (*p*). A direction to trustees to sell "at such time, and in such manner as they shall think fit," will not authorize them arbitrarily to postpone the sale

(*l*) *Moody v. Walters*, 16 Eden, 238.
Ves. 307, 310, 311.

(*m*) *Osbreys v. Bury*, 1 Ball & Beat. 58.

(*n*) *Hopkins v. Hopkins*, 1 Atk. 590.

(*o*) *Burgess v. Wheate*, 1

(*p*) *Gaskell v. Harman*, 11 Ves. 507; *Bernard v. Montague*, 1 Meriv. 433; *Hutchins v. Manning*, 1 Ves. Junr. 367; *Swan v. Fonnereau*, 3 Ves. 49; *Hawkins v. Chappell*, 1 Atk. 623.

sale to an indefinite period. Even under such words of large discretion, it would be necessary to decide upon the respective rights of the tenant for life and the remainder-man by some fixed rule, and to hold the conversion to have been made at some given period; just as much as if the trustees had been directed to sell "with all convenient speed (*q*)."

And if trustees have sold an estate which was charged with payment of a sum of money, but have neglected to satisfy that demand; they cannot, by a plea of the statute of limitations, protect themselves from the consequences of their breach of trust (*r*).

they must do so with all convenient speed.

In what case trustees cannot protect themselves from the consequences of a breach of trust, by pleading the statute of limitations.

If trustees for sale, or those acting by their authority, fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party; a Court of Equity will not countenance such a contract (*s*). But, it is established by all the cases, that, if the *cestui que trust* join with the trustees in that which is a breach of trust, knowing all the circumstances; such a *cestui que trust* can never complain of that breach of trust. And not only concurrence in the act, but acquiescence without original concurrence, will release the trustees. This, however, is only the general rule, admitting many distinctions; and Courts of Equity will

An improper contract entered into by trustees for sale will receive no aid from Equity.

By what acts of concurrence, or of acquiescence, a *cestui que trust* releases the trustees from responsibility to him, for a breach of trust.

(*q*) *Walker v. Shore*, 19 Ves. Price, 108. See, *ante*, p. 489. 392; *Elwin v. Elwin*, 8 Ves. (*s*) *Ord v. Noel*, 5 Mad. 441. 554: see, *suprà*, pp. 436, 487. See the head of "Specific Performance."
 (*r*) *Milnes v. Comley*, 4

will inquire into the circumstances which induced concurrence or acquiescence (*t*).

Trustees must not lend trust money, on the mere security of a trader's bond.

A power given to trustees to lend the trust money, upon such real or personal security as should be thought good and sufficient, will not authorize them to lend money to a trader, upon his bond; and the transaction will be a still more palpable breach of trust, if it appear to have been an *accommodation*, induced by personal connexion with the borrower (*u*).

Rules of Equity, where the consent of trustees to the marriage of a legatee is required to vest a legacy:

Where the consent of trustees to the marriage of a legatee is required, in order to vest a legacy; if such consent has been substantially given, though not *modo et formâ*, the legatee will be held duly entitled to the legacy (*w*). And, though it would be wrong to lay it down *generally*, that, even an express consent to a matrimonial connexion may not be retracted, or limited (*x*): yet, after a mutual attachment had been suffered to grow up under the sanction of the trustees, Lord Eldon observed, it would be somewhat late to state terms and conditions, on which a marriage between the parties should take place (*y*): and Lord Somers, more than a century before, declared, that, he looked upon a countermand of consent to the terms of a marriage *as nothing*, after the young people's affections were

(*t*) *Walker v. Symonds*, 8 Swanst. 64. *Desbouverie*, 2 Atk. 265.

(*u*) *Langston v. Ollivant*, Coop. 34: see, *ante*, p. 437. (*x*) *Smith v. Huson*, 1 Phillim. 300: but see *Merry v. Ryves*, 1 Eden, 6.

(*w*) *Worthington v. Evans*, 1 Sim. & Stu. 172; *Pollock v. Croft*, 1 Meriv. 187; *Daley v.* (*y*) *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 234.

were engaged (z). If the trustee himself be the person to whom the legacy would go over, in case of a non-compliance on the part of the legatee with the conditions on which the bequest was made; the refusal, or retractation, of consent to the marriage by such trustee, would be a very suspicious circumstance, though it might not necessarily imply fraud (a).

Where the trustee himself is the person to whom the legacy is given over, the reasonableness of his refusal of consent to the legatee's marriage will be closely examined.

Should a testator be induced to omit the insertion in his will of a formal provision for any intended object of his bounty, upon the faith of assurances, given by his heir, or any other person whose interests would be affected by the regular insertion of such a bequest in the will, that, the testator's wishes and intention shall be executed as punctually and fully as if the bequest were formally made; this promise and undertaking will raise a trust; which, though not available at common Law, will be enforced in Equity, on the ground of fraud (b). And an engagement, of the kind alluded to, may be entered into, not only by words, but, by silent assent to such a proposed undertaking; which will,

Equity will fix with a trust any one who prevents the insertion of a gift in a will.

(z) *Wanchford v. Fotherley*, 2 Freem. 201.

(a) *Garrett v. Pretty*, as stated (with prefatory observations) from *Reg. Lib.* in note to *Lloyd v. Branton*, 3 Mer. 120; *Clarke v. Parker*, 19 Ves. 12; *Mesgrett v. Mesgrett*, 2 Vern. 581; *Dashwood v. Lord Bulkeley*, 10 Ves. 243; *Harvey v. Aston*, 1 Atk. 380: and see

the head of "Testamentary Dispositions," ante, p. 401.

(b) *Chamberlain v. Agar*, 2 Ves. & Bea. 262; *Mestaer v. Gillespie*, 11 Ves. 638; *Stickland v. Aldridge*, 9 Ves. 519; *Barrow v. Greenough*, 3 Ves. 154; *Chamberlaine v. Chamberlaine*, 2 Freem. 34; *Oldham v. Litchford*, 2 Freem. 285.

will, equally, raise a trust (*c*). Of course, the case would be still stronger, if the due insertion of the legacy in the will had been prevented by any violent interference (*d*).

A trustee has a lien upon the trust fund for repayment of all necessary expenses.

It follows from the nature of a trustee's office, (whether it be expressed in the instrument or not,) that, the trust property must reimburse *him* all the charges and expenses incurred in the execution of the trust: but, it would be wrong to conclude, that, the persons employed by the trustee are, therefore, creditors of the trust fund; and that *they* can go against the same (*e*).

A trustee not discharged on the mere allegation that he has never acted.

A trustee will not be discharged, and a new trustee appointed in his room, on motion, grounded upon a mere statement at the bar that he has never acted: a previous reference to the Master will be directed, to look through the proceedings, and see whether the trustee remains accountable for any acts done by him as such; and, in case he does not, then to settle a release (*f*).

(*c*) *Byrn v. Godfrey*, 4 Ves. 10; *Paine v. Hall*, 18 Ves. 475.

(*e*) *Worrall v. Harford*, 8 Ves. 8.

(*d*) *Dixon v. Olmius*, 1 Cox, 414.

(*f*) ——— v. *Osborne*, 6 Ves. 455.

CHAPTER XIV.

Fraud in dealings with expectant Heirs, Reversioners, Infants, married Women, and persons laboring under embarrassed circumstances, or imbecility of mind (a).

THERE is no head of Equity more difficult of application than the avoidance of a contract, upon the ground that advantage has been taken of distress; but, generally speaking, there can be no title to such relief where the advantage, or disadvantage, of the contract depended upon subsequent contingencies, the result of which must have been equally uncertain to each party at the time of the contract (b). The case of an expectant heir, dealing for his *expectancy* during his father's life, is an exception; to that class of persons the Court of Chancery

Generally speaking, a contract cannot be avoided on the ground that advantage has been taken of distress, when the advantage, if any, depended on subsequent contingencies;

but, the case of an expectant heir forms an exception:

(a) For cases where the imbecility is such as may support a Commission of Lunacy, see the appropriate Chapter. See, also, the head of "Specific Performance," for instances in which catching bargains and contracts, tainted with fraud, have not been carried into execution: and the several heads of "Trust, Agents, Settlement,

Conveyance, &c." for cases in which such corrupt contracts have been rescinded, after actual execution.

(b) *Ramsbottom v. Parker*, 6 Mad. 6; *Paine v. Meller*, 6 Ves. 352; *Pritchard v. Ovey*, 1 Jac. & Walk. 403; *Revell v. Hussey*, 2 Ba. & Beat. 287; *Gowland v. De Faria*, 17 Ves. 25.

his sale, however, by public auction, of a reversion, may be supported;

though such a sale may, on the other hand, afford no evidence that the fair market price was given.

Where the dealing is, substantially, for the expectations of an heir, a colorable disguise of the bargain will not avail the purchaser.

Chancery seems to have extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract (c). And, although it has been decided, that, a sale by an expectant heir of a *reversion* (which is as much property as an estate in possession,) may be supported, if the property be sold openly by public auction, and such pretended sale be not used merely to cover a private bargain (d): yet, if the particulars of an auction-sale disclose, that, the vendor is a young man, about to raise money on *post obit* bonds, payable at the death of his father; and, that, the sale is to take place without a reserve of any bidding on the part of the vendor: in consequence of this relinquishment of the precaution by which every provident vendor protects himself against an inadequate price (e), such a vendor must be considered, in some degree, as in the power of those who deal with him; and a sale by auction, under such circumstances, does not afford fair evidence of the market price (f).

If an expectant heir be dealing, substantially, for his expectations, he is not the less entitled to the protection of the Court, because he deals, also, for a present obligation, which there is little probability that he should be able to discharge; or because he throws in a present possession, bearing but a small proportion to the whole interests bargained

(c) *Peacock v. Evans*, 16 236.

Ves. 514; *Marsack v. Reeves*, 6 Mad. 109; *Gwynne v. Heaton*, 1 Br. 9.

(d) *Shelley v. Nash*, 3 Mad. 112.

(e) *Bramley v. Alt*, 3 Ves. 628; *Ord v. Noel*, 5 Mad. 440.

(f) *Fox v. Wright*, 6 Mad.

bargained for (g): it is obvious, that, all the frauds which the general rule is intended to counteract, would be let in, if such a colorable evasion were permitted.

Whenever an expectant heir, or tenant in remainder in very embarrassed circumstances, enters into a dealing for the sale of his inheritance with an experienced attorney; a Court of Equity will not think it necessary to look very minutely into the circumstances, but upon grounds of public policy will be disposed to set aside the conveyance; and if, in such case, the party selling was ignorant of the extent and value of his property, whilst the purchaser knew both; if there was no valuation, no survey, no one to assist the ignorant and distressed vendor; such a transaction would be a gross fraud, on the face of it (h). So, in a case where a purchase was made at an inadequate price, from vendors who were in great distress (i), and without the intervention of any other professional assistance than the purchaser's attorney; these facts were considered sufficient evidence, that, advantage was taken of the distress of the vendors: and upon that ground, without the necessity of taking into consideration the additional circumstance, that the subject of purchase was a reversion, the conveyances were set aside (k).

If the future interests of a needy person are purchased by an attorney, Courts of Equity will be strongly disposed to set aside the conveyance:

as they will, where the only professional person employed in transacting a bargain with a distressed vendor, was the attorney of the vendee.

The principle upon which a Court of Equity will

The onus of proving, that, a

(g) *Davis v. Duke of Marlborough*, 2 Swanst. 154. Ves. 243; *Crome v. Ballard*, 11 Ves. Junr. 219; *Oliver v.*

(h) *Roche v. O'Brien*, 1 Ba. & Beat. 337, 338. Court, 8 Price, 168.

(i) *Pickett v. Loggon*, 14 424. (k) *Wood v. Abrey*, 8 Mad.

fair price was paid for a reversionary interest, rests with the purchaser:

will relieve reversioners from disadvantageous bargains is, that, persons who are treating for even *vested* reversions, are held to be so exposed to imposition and hard terms, and so much in the power of those with whom they contract, that it is a fit rule of policy, to impose upon all who deal with reversioners the *onus* of proving they paid a fair price; or otherwise to set aside their bargains, and compel a reconveyance of the property purchased. And although the soundness of this principle has been questioned, the rule seems, by a series of decisions, to be established (*l*).

a fortiori, where the subject of purchase is the expectancy of an heir:

A fortiori, where a person has dealt with an heir apparent, for interests not vested, but which constituted, a bare expectancy; it does not rest with the heir to shew that the bargain was unreasonable and improvident; but it lies on the other side to shew that it was reasonable (*m*): this principle, however, must not be carried to the extent of enabling an heir expectant, or remainder-man, to do palpable injustice; it may empower him to set aside an imprudent contract on repayment of the consideration actually received, but it will not authorize him "to take out of any man's pocket any thing he pleases, and never replace it (*n*)."

but if the contract be set aside, the consideration must be returned:

And where the contract for purchase of a reversionary interest was unimpeachable at the time of the agreement, its performance cannot be resisted, although

and a fair agreement as to a reversionary interest must be performed, al-

(*l*) *Shelley v. Nash*, 3 Mad. 236; *Gowland v. De Faria*, 17 Ves. 24; *Marsack v. Reeves*, 6 Mad. 109. *borough*, 2 Swanst. 139.

(*n*) *Bernal v. Marquis of Donegal*, 3 Dow, 151; *Bowes v. Heaps*, 3 Ves. & Bea. 121.

(*m*) *Davis v. Duke of Marl-*

although the life, or lives, on which the reversion depended, have fallen in before the completion of the purchase. Every such bargain is necessarily made subject to this contingency (o). though the lives on which the reversion depended may have fallen in.

In all cases where a gift is immoderate; bears no proportion to the circumstances of the giver; *ubi modus non adhibetur, ubi non refertur ad facultates*; and the giver is a weak man, liable to be imposed upon; a Court of Equity will strictly examine the conduct of the persons in whose favor such gift is made: and if the Court see, that, any arts or stratagems, or any undue means whatever, have been used to procure the gift, it will and ought to interpose (p). Where bonds payable upon contingencies are given to loose women by heirs apparent, the probability is, they were given *pro turpi causâ*; at all events, a Court of Equity seeing the parties in a situation so liable to be imposed upon and unduly influenced, will presume they were so; and admit no proof to the contrary (q). Equity will strictly scrutinize the conduct of persons in whose favor a gift, apparently unreasonable, has been made, by a weak man: nor can a bond given *pro turpi causâ*, be enforced.

There are many instances, in which a party may not be a proper subject for a commission of lunacy, yet his state of mental powers may be such as to call for the peculiar protection of a Court of Equity, by assigning him a guardian. With respect to infants this is every day's practice; and the The Court of Chancery may impose the restraint of infancy upon a person of full age, whose weakness of intellect calls for this protection.

(o) *Paine v. Meller*, 6 Ves. 353; *Harford v. Purrier*, 1 Mad. 539; *White v. Nutt*, 1 P. Wms. 62; *Ex parte Manning*, 2 P. Wms. 410. Wilmot's notes, 61; *White v. Small*, 2 Cha. Ca. 103; *Aylward v. Kearney*, 2 Ball & Beat. 472.

(q) *Bridgeman v. Green*, Wilmot's notes, 73.

(p) *Bridgeman v. Green*,

the hypothetical disability in the case of infancy, may really subsist when the party is of age; or even a much greater degree of incapacity: in such cases, though the party cannot be found a lunatic, by inquisition, the Court of Chancery itself appoints a guardian; imposing all the restraints of infancy, and binding the party by the acts of that guardian (r).

The acts of an infant, or of a *feme covert*, are, in most instances, inoperative as against themselves;

but neither infancy, nor coverture, can authorize fraud:

in the consequences of which they may be implicated by mere privity.

But, although Courts of Equity are always anxious to afford their protection to those who, from their situations, are unable to protect themselves: and upon this ground, in legal contemplation, the acts of an infant, or a *feme covert*, are, in most instances, inoperative as against themselves, yet coverture never authorizes fraud (s); nor does infancy (t): for if an infant be old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it (u): therefore, if, in any transaction wherein an infant may be implicated, there appear fraud, of which the infant was consentant, he will be as much bound as an adult (w). For instance, if an infant, knowing his rights, stand by and see another in treaty for the purchase of his estate, without giving him notice of his title, the infant will not be permitted afterwards to set up his title to avoid the purchase; for neither infancy nor coverture can excuse such an apparent fraud:

(r) *Sherwood v. Sanderson*, 19 Ves. 283.

(s) *Evans v. Bicknell*, 6 Ves. 181: see *infra*, p. 504.

(t) *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 489; *Earl of Buck-*

inghamshire v. Drury, 2 Eden, 72; *Cory v. Gertchen*, 2 Mad. 49.

(u) *Watts v. Cresswell*, 2 Eq. Ca. Ab. 515.

(w) *Beckett v. Cordley*, 1 Br. 358.

fraud: and it is not necessary that an infant, or *feme coverte*, should be active in promoting such purchase, in order to estop them from complaining of it; if it appear they were so far privy to it, that, it could not be completed without their knowledge (*x*).

An infant cannot be made a bankrupt (*y*): but, when it appears, that, he held himself out to the world as an adult and *sui juris*, contracting debts as such; the Court will not on petition make an order to supersede a commission issued against him; but will leave him to bring his action at Law. He is no more entitled to any favor and assistance than a *feme coverte*, who lives apart from her husband and contracts debts, professing to be a *feme sole*: a woman of that description is always left, at common Law, to make the best she can of her formal plea of coverture, in any action brought against her; and summary relief, by interference of Court, is always refused to her (*z*). An infant may be charged in trover, for that implies a *tort*; but he cannot be decreed to account as bailiff, or factor; nor be sued in respect of contracts (*a*).

An infant who has held himself out as an adult; and a *feme coverte* who has professed to be a *feme sole*, will have no summary aid, either in Equity,

or at common Law.

An infant cannot be decreed to account.

When an estate is purchased on behalf of infants, notice of any equitable incumbrance is as binding upon the infants as if they were adults: otherwise, a man would only have to purchase on behalf

Notice of incumbrances, affecting estates purchased on behalf of infants, is binding upon the infants.

(*x*) *Savage v. Foster*, 9 Modern Rep. 37.

(*y*) *Ex parte Layton*, 6 Ves. 440.

(*z*) *Ex parte Watson*, 16 Ves. 266.

(*a*) *Smalley v. Smalley*, 1 Eq. Ca. Ab. 6.

behalf of infants to free an estate of all equitable incumbrances to which it might be subject (*b*).

An infant, or *feme coverte*, may take under a will as trustees only; ill adapted as such parties must be to fulfil the duties of a trust.

Where a devise, or bequest, is made to a married woman, or an infant, in terms which, if applied to an adult, would create a trust; these terms must have the same effect with respect to the infant, or *feme coverte*: for, however little adapted such persons are to fill the office, and perform the duties, of trustees (*c*); yet, if such an appointment be actually made, the parties cannot, upon the strength of its singularity, and their incompetence to act as trustees, set up a claim to a beneficial interest (*d*). In one case, extraordinary as it may seem, an infant was declared to be a trustee of an estate, purchased in his name, solely on account of his tender years at the time (*e*).

Though coverture never authorizes fraud; yet, there may be cases in which fraud committed by a married woman cannot be redressed;

When it was said, above, that, coverture never *authorizes* fraud; it must not be inferred, that, every fraud committed by a *feme coverte* can be redressed. Property may be given for the separate use of a married woman, and if it be so given, without more, the power of alienation may be a necessary incident of such property (*f*): but, if the settlement of separate property upon a *feme coverte*

(*b*) *Toulmin v. Steere*, 3 Meriv. 223; citing *Le Neve v. Le Neve*, 3 Atk. 646.

(*c*) *Blinkhorn v. Feast*, 2 Ves. Senr. 30.

(*d*) *King v. Denison*, 1 Ves. & Bea. 275; *Jevon v. Bush*, 1 Vern. 343.

(*e*) *Binion v. Stone*, 2 Freem.

169; *S. C. Nelson*, 68. This case was decided by Lord Clarendon, C., assisted by Hale, C. B., and Windham, J.; but see *Lamplugh v. Lamplugh*, 1 P. Wms. 112, *contra*.

(*f*) *Hulme v. Tenant*, 1 Br. 19; *Fettiplace v. Gorges*, 1 Ves. Junr. 48.

coverte be coupled with a clause prohibiting anticipation, that clause is binding (*g*). If, in such case, the wife join with her husband in a deed of assignment of separate property so settled on her for her life, although she may be a party to the misrepresentation and concealment of the settlement and clause against anticipation, the assignee can have no relief. Supposing the concealment to be clearly the wife's personal fraud, the question has reference not only to her interest, but to the intention of the author of the settlement; and a Court of Equity will not be disposed to suffer the wife's fraud to give her a power of alienation, against the intention of the settler. This might induce husbands to compel their wives to join in a fraud, for the purpose of thereby acquiring the power of alienation (*h*).

for the question may not have reference to her own interests only.

Where a marriage is fraudulently procured to be solemnized between parties, one of whom is a minor, (and not a widower or widow,) on an information, filed within one year after the offence committed; the Courts of Chancery, or Exchequer, are empowered to secure all estate and interest in any property, which may accrue to the offending party by force of such marriage, for the benefit of the innocent party; or, where both parties contracting such marriage have been equally offenders, then, immediately for the benefit of their issue (*i*).

How the property of minors, whose marriage has been fraudulently procured, may be secured.

The

(*g*) *Brandon v. Robinson*, 18 Ves. 434; *Ritchie v. Broadbent*, 2 Jac. & Walk. 458.

Meriv. 488.

(*h*) *Jackson v. Hobhouse*, 2

(*i*) Stat. 4 Geo. 4, c. 76, s. 23: see *Priestley v. Lamb*, 6 Ves. 424.

The Court of Chancery is not disposed to visit severely the offence of marrying a ward of Court, after a great lapse of time:

but, where the case calls for it, all the parties concerned may be committed.

The Court of Chancery has a right, after any lapse of time, to take notice of a contempt committed by marrying a ward of the Court: on the other hand, as that jurisdiction is to be exercised according to a sound discretion, all circumstances will be considered, before the Court determines what is to be done: and though a case might, if it had been brought forward immediately after the marriage, have imposed the painful duty of inflicting personal suffering on the parties; yet, the Court would not be disposed to hold it a wholesome exercise of discretion, to visit the offence strongly, if, upon attention to circumstances that have occurred in a course of years subsequent to the offence, it be not very strongly called upon to vindicate the jurisdiction (*k*). When the case, however, does call for it, all the parties offending may, not only be committed (*l*), but, indicted for a conspiracy; or proceeded against by a criminal information filed by the Attorney-General (*m*); in which the officiating clergyman may be included (*n*): and it will be no excuse for the party who has married a ward of Court, to allege, that, he was ignorant of her being such (*o*). The Court may, possibly,

(*k*) *Ball v. Coutts*, 1 Ves. & Bea. 297, 300, 302.

(*l*) *Goodwin's case*, and *Hannes v. Waugh*, cited 2 P. Wms. 112.

(*m*) *Ball v. Coutts*, 1 Ves. & Bea. 298; *Millet v. Rouse*, 7 Ves. 419; *Wade v. Broughton*, 3 Ves. & Bea. 173; *Pearce v.*

Crutchfield, 16 Ves. 48; *Priestley v. Lamb*, 6 Ves. 423.

(*n*) *Millet v. Rouse*, and *Priestley v. Lamb*, *ubi supra*; *Nicholson v. Squire*, 16 Ves. 261; *Warter v. Yorke*, 19 Ves. 453.

(*o*) *Nicholson v. Squire*, 16 Ves. 260.

sibly, not be *bound, ex officio*, to punish a contempt of this nature, where there is no complaint (*p*); but, still, a complaint is not necessary to ground the jurisdiction: the Court, when informed, however tardily, of such a transaction, has a right, and may, under circumstances, be bound, to take notice of it: although the fact, that there was no complaint, if it stood alone, would have weight in the question whether the Court would do well to interfere (*q*): The Court of Chancery will not only interfere to prevent improper marriages of wards of Court; but will also, on petition, assist testamentary guardians in restraining their wards from forming such marriages (*r*): and, if the case call for it, will order guardians not to permit their infant wards to marry without the consent of the Court (*s*).

A complaint is not necessary to ground the jurisdiction, in such cases.

The Court of Chancery will aid testamentary guardians in restraining their wards from marrying improperly.

A Court of Equity will not be disposed to view transactions between father and son in the light of reversionary bargains, if they can fairly be referred to proper and just family arrangements. A reasonable degree of jealousy will be employed in scrutinizing such transactions, lest they should be tainted with fraud, or, undue influence; but at the same time it will be borne in mind, that there may be other considerations, besides mere pecuniary

Courts of Equity are not disposed to view proper family arrangements in the light of reversionary bargains.

(*p*) *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 117. *vers*, 1 Ves. Senr. 313; *Pearce v. Crutchfield*, 14 Ves. 206.

(*q*) *Ball v. Coutts*, 1 Ves. & Bea. 299. (*s*) *Smith v. Smith*, 3 Atk. 307; *Lord Raymond's case*, *ubi*

(*r*) *Lord Raymond's case*, Ca. temp. Talb. 59; *Beard v. Tra-*
suprà.

ary ones, which may make such arrangements conducive to the best interests of all parties (*t*).

A party's intoxication may invalidate a bargain.

When advantage has been taken of a party's youth and inexperience, and habits of intoxication into which he has been seduced; no unfair bargain made with a party under such circumstances can be maintained: at all events not in a Court of Equity (*u*).

A trustee for a married woman, will not be allowed to obtain payment, out of her property, of a debt due to him from her husband.

If a person procure himself to be appointed trustee of the separate property of a married woman, with a view to pay himself, out of such property, a debt due to him by her husband: the existence of which debt he suppressed till he was appointed trustee; a Court of Equity will not allow him to derive any benefit from transactions which have arisen out of such an imposition (*w*).

(*t*) *Tweddell v. Tweddell*, 1 Ves. 16; *Say v. Barwick*, 1 Turn. & Russ. 13; *Middleton v. Lord Kenyon*, 2 Ves. Junr. 410. Ves. & Bea. 190; *Dunnage v. White*, 1 Swanst. 150.

(*w*) *Dalbiac v. Dalbiac*, 16 Ves. 124.

(*u*) *Cooke v. Clayworth*, 18

CHAPTER XV.

Frauds in Annuity Transactions.

THE jurisdiction of a Court of Equity to order void deeds to be delivered up to be cancelled, though it has, formerly, been doubted, is now fully established (*a*): and, that a defect in the memorial of an annuity lays a sufficient ground for the exercise of this jurisdiction, has been too often decided to be open to discussion (*b*).

A Court of Equity may order void deeds to be delivered up; and, a defect in the memorial of an annuity furnishes ground for the exercise of this jurisdiction.

Courts of Equity have, frequently, acknowledged the distinction between acts of Parliament denying *legal* effect to certain instruments, and acts declaring other instruments to be void to *all* intents and purposes: collecting from the more extensive words the inference, that, the equitable, as well as the legal jurisdiction was intended to be prohibited. Upon that express distinction the doctrine as to the annuity act has proceeded: if that act had merely declared, that, the *instrument* should be void, all the *contract* would still have remained; under which, though no interest passed, a right would have been created, giving the Court of Chancery

Where acts of Parliament deny *legal* effect to instruments, *equitable* interference is often held not to be, thereby, prohibited; as it is where an act of Parliament declares, that, certain defects shall render an instrument void to *all* intents and purposes.

(*a*) *Corporation of Colchester v. Lowten*, 1 Ves. & Bea. 244.

Ves. 360; *Underhill v. Hornood*, 10 Ves. 218; *Bromley v. Holland*, Coop. 20.

(*b*) *Dupuis v. Edwards*, 18

Not to impeach a memorial till after the death of witnesses, suspicious.

The right of Courts of Equity to impose terms, as a condition of relief as to annuity transactions, may depend upon the specific relief sought: that is, whether the application be made on equitable grounds;

or, to have the deed delivered up,

Chancery a right to interpose: but, the act declaring the instruments void to all intents and purposes; and its policy requiring, that, they should not be set up to any intent or purpose; the Court has refused, by the exercise of its equitable jurisdiction, to fasten on the conscience of the grantor, and to hold him bound by his contract notwithstanding the statute (c). But, if the grantor of an annuity delay making any objections to the memorial, until the witnesses, who might have proved its accuracy, are dead, or become incompetent; the *ex parte* affidavits impeaching the memorial will be entitled to very little attention (d).

In examining the right of Courts of Equity to impose terms, as a condition of relief in respect of annuity transactions, it seems necessary to consider, in each case, what is the specific relief sought. If the application be made on *equitable* grounds, alleging that the grant was obtained by fraud, extortion, or undue advantage of any kind; there, upon the principle that he who asks relief against fraud should not himself act fraudulently (e); it is obviously just that the applicant should engage to return the consideration actually received by him for his grant (f): but if the application be to have the annuity deed delivered up, — not upon any of the grounds which might bring the matter within the jurisdiction of a Court of Equity with reference to its

(c) *Davis v. Earl of Strathmore*, 16 Ves. 428.

(d) *Symmons v. Mortimer*, 5 T. R. 140; *Cousins v. Thompson*, Hunt on Annuities, 241;

Morse v. Royal, 12 Ves. 378.

(e) *Rome v. Wood*, 1 Jac. & Walk. 333.

(f) *Aguilar v. Aguilar*, 5 Mad. 416.

its own peculiar doctrines, and upon which it may exercise an undoubted discretion as to setting the deed aside; but—as being absolutely void under the statute (g): it should seem, that, the plaintiff would be entitled to *that* relief, without accounting for the consideration paid for the annuity (h); leaving the annuitant to proceed at Law (i). If the grantor be *defendant*, and the annuity be void, a Court of Equity would have no more right to interfere, than if the grantee's demand were for an ordinary debt (k): even were it shewn that the due execution of the deed was prevented by fraud, the right to equitable relief appears doubtful (l); if an analogy may be drawn from the decisions under the register acts: the *dicta* to be found in the books lead to a conclusion that the grantee's only remedy must be by an action for money had and received (m).

on the ground that it is absolutely void under the statute:

if the grantor be *defendant*, and the annuity void, there appears no ground for any interference of Equity.

And a *feme covert* may file a bill as *plaintiff* in a suit to set aside an annuity, without offering to return the price paid for such an annuity: since at Law no action would lie against her in respect of a demand founded on mere contract and general

A *feme covert* may file a bill as *plaintiff*, to set aside an annuity, without offering to return the price paid;

(g) Stat. 53 Geo. 3, c. 141. Ves. 494.

(h) *Baxxelgetti v. Battine*, 2 Swanst. 156 n., 157.

(i) *Shove v. Webb*, 1 T. R. 735; *Scurfield v. Gowland*, 6 East, 241; *Williamson v. Goold*, 1 Bingham, 241; *Low v. Barchard*, 8 Ves. 136.

(k) *Duke of Bolton v. Williams*, 2 Ves. Junr. 147; *S. C.* 4 Br. 310; *Jones v. Harris*, 9

(l) *Mestaer v. Gillespie*, 11 Ves. 626; *Thompson v. Leake*, 1 Mad. 43; *Thompson v. Smith*, 1 Mad. 406; *In re Ship Warre*, 8 Price, 274; *Ex parte Wright*, 19 Ves. 258.

(m) *Hicks v. Hicks*, 3 East, 16; *Holbrook v. Sharpey*, 19 Ves. 133.

ral engagement; and, by analogy, a Court of Equity would refuse to fasten upon her property equities arising out of contract and general engage-

ment only (n): if the grant be valid, Equity will apply her separate property in payment of an annuity which she has expressly charged upon it; since, in such case, a Court of Equity alone can

give the requisite relief (o); but the Court cannot apply her separate property in repayment of the consideration money, which is a demand she has not charged upon it (p).

In *Aguilar v. Aguilar* the objection taken was a legal one, to the memorial; and therefore, it should rather seem, any other plaintiff might have applied as well as a *feme coverte*, to have such an annuity deed delivered up, without offering an account:

though where such relief is sought on equitable grounds, it will in no case be

In *Aguilar v. Aguilar*, one of the cases referred to in the last paragraph, the objection was a legal one, to the memorial: and it may be observed, respectfully, that the reasoning employed in the judgment, though fine,—and, if intended to apply to cases where a *feme coverte* seeks relief upon equitable grounds, very important,—was not absolutely necessary for the purpose of deciding the case then before the Court; unless it be denied, that the authorities, already cited, establish the right of any plaintiff,—a male adult, perfectly *sui juris*, as well as a *feme coverte*,—to apply to a Court of Equity to have an annuity deed delivered up, on the ground of a legal informality, without offering an account: where relief against an oppressive deed is sought upon equitable grounds, the Court, even in favor of expectant heirs, (a class

(n) *Aguilar v. Aguilar*, 5 Mad. 418; *Angell v. Hadden*, 2 Meriv. 169.

(o) *Essex v. Atkins*, 14 Ves. 546, 1 Ba. & Beat. 152; *Great-*

ley v. Noble, 3 Mad. 94.

(p) *Stuart v. Lord Kirk-mall*, 3 Mad. 389; and *Aguilar v. Aguilar*, *ubi supra*.

class of suitors to whom it extends the most ample protection,) will not grant it, except on a tender of the consideration money, and interest (v). granted, except upon a tender of the consideration money, and interest.

By bearing in mind this distinction between deeds which are voidable upon fraudulent circumstances *dehors* the deed, and annuities which are *ipso facto* void on the face of the deed; it is believed, the discrepancy which has been supposed to exist between the various decisions on this subject, will be materially lessened, if not entirely done away; though many of the *dicta* will still remain irreconcilable.

The conclusion submitted (though with no presumptuous confidence,) is, that, where the plaintiff has sought to have the annuity deed delivered up, as being void under the statute, and has not offered by his bill to account; there the authorities seem to bear out the position, that terms cannot be imposed by a Court of Equity (r): but, clearly, where the plaintiff seeks to avoid, upon equitable circumstances, an instrument valid at Law, there he will be compelled to do what is just, as the condition upon which alone he will receive the aid of Equity. Attempt to reconcile the supposed discrepancy of the cases on this subject.

Of course, when the grantor of an annuity, by his bill, *offers* to account (s), that will give a Court of When the grantor of an annuity, by his bill,

(q) *Davis v. Duke of Marlborough*, 2 Swanst. 166. ibid. 621; Byne v. Vivian, ibid. 604, (as to which, see 5 Mad.

(r) *Bazelgetti v. Battine*, 2 Swanst. 156, 157. 417, note); Hoffman v. Cooke, ibid. 631; Dupuis v. Edwards,

(s) *Holbrook v. Sharpey*, 19 Ves. 131; *Bromley v. Holland*, 5 Ves. 611; *Ex parte Shaw*, 18 Ves. 359; were all cases in which the plaintiff offered to account.

offers to account; Equity will hold him to the terms of his own proposal; however defective the deed, which he seeks to have delivered up, may be.

Neither an assignment of an annuity, nor an agreement to grant an annuity, require enrolment;

nor an annuity not sold for money.

Provision made by a late statute, in case the grantor of an annuity become bankrupt.

of Equity jurisdiction to keep him to the terms of his own proposal; and, although the deed be absolutely void, it will be ordered to be delivered up only on repayment of the consideration actually advanced (*t*).

An assignment of an annuity does not require enrolment (*u*): neither is an agreement to grant an annuity within the act; an execution of such an agreement, therefore, though not enrolled, may, in Equity, be enforced (*w*). And the enrolment of such an agreement would be merely superfluous; as no action at Law could be maintained upon such an instrument: for, to constitute a legal annuity deed, there must be positive words of immediate and present grant (*x*). Nor is enrolment necessary where the annuity is not sold for pecuniary consideration (*y*).

Until a modern statute gave relief (*z*); if the grantor of an annuity became bankrupt, and the annuitant could only prove under the commission for any arrears which might be due, but not in respect of the growing claims; unless, previously to such bankruptcy, the bond, by which payment of the annuity was secured, was broken, and the penalty forfeited; but, now, in all cases, the annuity must be valued, and proof, to the amount of such valuation,

(*t*) *Davis v. Duke of Marlborough*, 2 Swanst. 156.

(*u*) *Brown v. Like*, 14 Ves. 306.

(*w*) *Nield v. Smith*, 14 Ves. 491: see *post*, p. 518.

(*x*) *In re Locke*, 2 Dowl. &

Ryl. 607.

(*y*) *Blake v. Attersoll*, 2 Barn. & Cress. 882.

(*z*) Stat. 49 Geo. 3, c. 121, s. 17; the substance of which now forms the 52nd sect. of the statute 5 Geo. 4, c. 98.

valuation, will be admitted; whether the annuity was merely a personal one, or secured upon real estate. If, however, the annuitant have received any payments subsequently to the bankruptcy, such payments must be deducted from the amount of his proof (*a*): but, as we have said, it is, now, immaterial, as to admission of proof, by what assurance the annuity was secured; or whether any arrears were, or were not, due upon the annuity at the time of the bankruptcy (*b*).

The statute of 49 Geo. 3, above cited, appears to have contemplated, in the section referred to, nothing more than the situation of a *sole* grantor of an annuity, no provision is made with regard to sureties, or to the case of a *joint* grant of an annuity. The object of the clause seems to have been merely to discharge the bankrupt and his future effects; but not to make the certificate of the bankrupt operate to prevent the annuitant from proceeding against the sureties, or co-grantors; which right it would be palpably unjust to deprive him of. That right, however, he might find it difficult to make effectual, in a Court of common Law at least, against the solvent grantors, after receiving a dividend on the estimated value of the annuity, under the commission against the bankrupt grantor; for a Court of Law has no means to *apportion* the yearly value. A Court of Equity could alone, satisfactorily, deal with such a question.

The statute 49 Geo. 3, applies only to the case of a *sole* grantor of an annuity;

its object appears to have been to discharge the bankrupt; but not to prevent the annuitant from proceeding against sureties, or co-grantors:

(*a*) *Ex parte Key*, 1 Mad. 429: 52; *Ex parte Thistlewood*, 19 and see, stat. 5 Geo. 4, c. 98, s. Ves. 249: see the head of 103. "Bankruptcy."

(*b*) Stat. 5 Geo. 4, c. 98, s.

but the general bankrupt act specially points out the course of proceeding by, or against, collateral sureties in such cases.

tion (c). The 53d section of the consolidated bankrupt act (d), removes any doubt which might previously have arisen, as to the proper course to be pursued by, or against, *sureties*, in such cases. The section cited contains an enactment, that, it shall not be lawful for any person entitled to an annuity granted by any bankrupt, to sue any person who may be *collateral* surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the arrears thereof; and if such surety, after such proof, pay the amount proved, he shall be discharged from all claims in respect of such annuity: and if such surety shall not (before any payment of the said annuity, subsequent to the said bankruptcy, shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have been paid or satisfied the amount so proved, with interest thereon at the rate of *£4 per cent. per annum*, from the time of notice of such proof, and of the amount thereof, being given to such surety: and, after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satisfied by such surety: and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity: provided that such
surety

(c) *Baxter v. Nicholls*, 4 Taunt. 92.

(d) Statute 5 Geo. 4, c. 98.

surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

In estimating the value of an annuity, at the time of the bankruptcy of the grantor, or at any other given period, the actual value cannot depend merely on the original price; though *that*, it has been held, is certainly, more or less according to circumstances, to be taken into account. The redemption price affords no evidence of value whatever; it is not fixed upon any calculation of value; and its amount is always the same; depending upon none of those variations in respect of circumstances, which must govern the calculation of the actual value. If the question is brought before the Lord Chancellor sitting in bankruptcy, he will notice any fraud or oppression which may have tainted the original transaction; although the nature of the contract may not have been adverted to by the commissioners: but, where there are not any peculiar circumstances to affect the price, as it is altered by the effluxion of time, and *only* by the effluxion of time; it must be presumed, that, the parties acted fairly at the time when the contract was made; and, that, the value of the annuity is, the original sum given, with a due allowance for the variation occasioned by the lapse of time since the grant (e).

In estimating the value of an annuity, the original price cannot determine the actual value:

The redemption price affords no evidence of value whatever.

Rule, on this subject, in bankruptcy.

An

(e) *Ex parte Whitehead*, 1 tlenwood, 19 Ves. 254; *S. C.* Meriv. 14, 128; *S. C.* 19 Ves. 1 Rose, 295; *Butcher v.* 561: and see *Ex parte This- Churchill*, 14 Ves. 574. This

An annuity secured upon a lease is a charge upon any renewed term.

An annuity secured upon a leasehold estate, is a charge upon any renewed term; and the annuitant is not bound to contribute to the fines of renewal; for, that would be to make him pay the consideration twice (*f*).

Rules as to the purchase of an annuity before a Master in Chancery.

When an annuity is sold before a Master in Chancery, as the purchase of an interest of this uncertain nature must have been made with a view to the value at the time, the Court considers the purchaser as entitled to the benefit of the annuity from the confirmation of the report: and that he should pay interest upon his purchase money from the very day upon which he first could have confirmed the report (*g*).

Specific performance of an agreement for the grant of an annuity, may, if free from fraud, be enforced in Equity;

When an agreement for the grant of an annuity has been entered into; and the intended grantee, in reliance thereon, has actually advanced the purchase-money; specific performance of the contract, if fair and free from fraud, will be decreed: for, it would be against conscience to allow the grantor, after having enjoyed the accommodation of the purchaser's money, to recede from the condition on which he obtained it. And as to the objection, that, the annuity was to depend on lives which had not been named; if it appear that the delay in doing this was attributable to the grantor, he will not be

arrangement made, when the annuity was to depend on lives, which have not been named:

rule for determining the value of an annuity, in cases of bankruptcy, (whatever latitude may be left in other cases,) is fixed by the 52d section of the statute 5 Geo. 4, c. 98.

(*f*) *Moody v. Matthews*, 7 Ves. 184.

(*g*) *Twigg v. Field*, 13 Ves. 518: see, and compare, *Ex parte Minor*, 11 Ves. 539, with *Anson v. Towgood*, 1 Jac. & Walk. 639: and see the Chapter on "Settlement and Conveyance" *ad finem*.

be allowed to take advantage of it: the Court, however, will take care that injustice is not done, on the other side, by nominating new lives which were not in existence at the time of the contract (*h*). This last provision meets (to a certain extent, at least,) the argument used in *O'Herlihy v. Hedges* (*i*).

Where a fraudulent advantage has been taken of the distress of the grantor, to obtain an annuity at a grossly inadequate price, these circumstances may afford a ground upon which Equity will relieve (*j*): but the single fact, that, the best price which might have been obtained has not been given, will not be a sufficient ground for rescinding the transaction (*k*). And when a contract respecting an annuity was fair at the moment when it took place, the accident of its becoming more, or less, advantageous, by the death of the party, or parties, on whose life, or lives, it was to depend, will be no ground for resisting the execution of the agreement, on either side (*l*).

An annuity granted, not as a degrading bargain for future illicit intercourse, but, as the *præmium pudicitiae*, and in consideration of past cohabitation; will, if the grant is completed, be good as against

Equity will relieve, where an annuity has been extorted from a distressed person, at a grossly inadequate price;

subsequent accidental advantage, no ground for resisting execution of the agreement.

An annuity granted as the *præmium pudicitiae*, is, when the grant has been completed, good against the grantor, but not against his creditors:

(*h*) *Pritchard v. Ovey*, 1 Jac. & Walk. 404. wood, 10 Ves. 219.

(*i*) 1 Sch. & Lef. 128. See (*k*) *Heathcote v. Paignon*, 2 Br. 178; *Low v. Barchard*, 8 Ves. 137; *Griffith v. Spratley*, 1 Cox's Ca. 389.

"Settlement, Conveyance," &c. in this Treatise. (*l*) *Gowland v. De Faria*, 17 Ves. 25; *Paine v. Meller*, 6 Ves. 352.

(*j*) *Lanley v. Hooper*, 3 Atk. 279, 281; *Underhill v. Hor-*

against the grantor (*m*): but, if he become bankrupt, a debt arising out of a bond given to secure payment of such annuity cannot be proved under his commission: if the grantor were solvent, it would be right that he should make a provision for the partner of his vice; but such a debt, being tainted with immorality, will not be allowed to come in competition with creditors whose claims

and even against the grantor himself, if the grant be not completed, his written promise to make it, cannot be enforced.

are liable to no impeachment (*n*). And even against the grantor himself, if the grant be not completed, his written promise to make it cannot be enforced; a Court of Equity will consider such promise as merely voluntary, and founded on no good, meritorious, or valuable consideration (*o*).

An assignment of a pension from Government, is a very imperfect security for the payment of an annuity:

An assignment of a pension, held under Government by the grantor of an annuity, offers but a very imperfect security for the continued payment of such annuity. As between the Crown and the assignee the Court of Chancery has no jurisdiction; if the annuitant have any remedy, it must be in the Court of Exchequer, sitting as a Court of Revenue (*p*): and it is extremely doubtful whether he could have any relief in that Court, if it should appear, that, by an Order in Council, the Crown has withdrawn the pension in consequence of any misdemeanor, or default, of the party to whom

(*m*) *Gray v. Matthias*, 5 Ves. 290; *Turner v. Vaughan*, 3 Wils. 340.

Prec. in Cha. 115; *Gray v. Rooke*, Ca. temp. Talbot, 155; (*o*) *Matthews v. Lee*, 1 Mad. 564; *Knye v. Moore*, 1 Sim. & Stu. 64.

Lady Cox's case, 3 P. Wms. 340. (*p*) *Case of The York Buildings Company*, 2 Atk. 56.

(*n*) *Ex parte Ward*, cited 15

whom it was granted (*q*). Where, indeed, a *liberate* for payment of the pension has issued, and the proper officer admits he has money in his hands applicable to the payment; as against such officer the pensioner might himself have maintained an action; and his equitable assignees may have relief in Chancery, as well as in the Court of Exchequer (*r*).

where, indeed, a *liberate* for payment of the pension has issued;

as against the officer who ought to pay it, the assignee of the pensioner may have relief, either in Chancery or the Exchequer.

When a person has covenanted to pay to the trustees of his marriage settlement a certain sum, within a given time, the interest of which sum, and also of other funds included in the settlement, is made payable to him for life; if the covenant be broken, and the money remain unpaid, and the party grant an annuity, for securing which, he, without the privity of the trustees, assigns the aforesaid dividends; the trustees are justified, in stopping the dividends, not merely if they begin to do so as soon as the covenants are broken, but at any time afterwards, at their discretion: for the assignee, taking no legal interest in the funds, could only take subject to the same equity to which the assignor was liable. The annuitant must have been aware of the covenant; and it was his own neglect not to inquire whether it was satisfied: he can have no equity against the trustees where he has not been misled by them (*s*).

A person who has accepted an assignment of dividends settled, conditionally, on another for life, as security for the payment of an annuity;

is subject to the same equity to which the assignor was liable.

If, upon a dissolution of partnership, the existing lease of the premises in which the business has been

If an annuity be secured by assignment of a

(*q*) *Priddy v. Rose*, 3 Meriv. Senr. 312.
104.

(*s*) *Priddy v. Rose*, 3 Meriv.

(*r*) *Row v. Dawson*, 1 Ves. 107.

lease, and also by bond, conditioned to be void in case the grantor should be dispossessed of the premises, without "any collusion, contrivance, act, or default of his own;"

the bankruptcy of the grantor will not work such a dispossession as was contemplated by the agreement.

An annuity may be so bequeathed as to cease, if the annuitant *do any act* to authorize others to receive the same;

but, his interest in the annuity would pass to his assignees, if he were made a bankrupt,

been carried on, are assigned to the continuing partner; in consideration of which he grants to the retiring partner an annuity secured by an assignment of the existing lease, and benefit of all renewals thereof in trust; and also by bond, conditioned to be void on payment of the annuity, or "in case he should at any time after the expiration of the then existing lease *be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own;*" and the grantor, after obtaining a renewal of the lease, becomes bankrupt, so that the renewed lease passes under the assignment of his estate; this is not such an eviction or dispossession as was contemplated by the agreement; and the annuitant, or his representative may assert, in Equity, a *lien* upon the premises for payment of the annuity (*t*).

Where a testator has bequeathed an annuity, as a means of personal support only to the object of his bounty, and not as a fund of credit; and has guarded his intention by a proviso, that, the annuity shall cease whenever the annuitant shall do any act to authorize, or empower, others to receive the same; a forfeiture will be incurred, should the annuitant take the benefit of the insolvent act: for, signing the petition and schedule would be voluntary on his part (*u*). The case would be different if he were made a bankrupt; that would be compulsory upon him, and he would be merely passive

(*t*) *Holyland v. De Mendez*, 407: and see *Wilkinson v. Meriv.* 189. *Wilkinson*, 2 Wils. Cha. Ca.

(*u*) *Shee v. Hale*, 13 Ves. 58.

passive on the occasion; his interest in the annuity, therefore, would pass to his assignees (*w*): though, of course, the testator might, had he clearly expressed an intention to that effect, have made the annuity cease when bankruptcy took place (*x*).

unless the testator had provided for such a case.

If an estate be purchased through the medium of an agent, who had previously not only negotiated the sale of an annuity charged upon that estate, but also had regularly paid the same; this actual notice to the agent is, in Equity, considered as constructive notice to those who employed him; and they cannot defeat the annuity (*y*).

The purchaser of an estate charged with an annuity, cannot defeat it; if he had constructive notice.

Should a person, entitled to a rent charge upon an estate, grant a number of annuities, secured upon that rent charge; the *terre tenant* has a right to consider the whole as one annuity only, so far as he is concerned; there being only one legal right of entry. And should the contracting parties think fit, as between themselves, to split this entire charge into portions, and to make a variety of claims upon the owner of the estate; he may protect himself by filing a bill of interpleader: the principle of relief going to protect him, not only from being compelled to pay, but, also, from the vexation attending the discussion of all the suits that might otherwise be instituted (*z*).

A person entitled to a rent charge, cannot split it into a number of annuities, as against *terre tenant*; so as to harass him by a variety of claims.

When an annuity is bequeathed, or any disposition of property in the nature of an annuity is made

No apportionment, where an annuity is bequeathed over.

(*w*) *Wilkinson v. Wilkinson*, son, Wightw. 393.

Coop. 261: and see *Doe v. Bevan*, 3 Mau. & Sel. 358.

(*y*) *Toulmin v. Steere*, 3 Meriv. 222.

(*x*) *Cooper v. Wyatt*, 5 Mad. 489; *The King v. Robin-*

(*z*) *Angell v. Hadden*, 15 Ves. 246.

made, first in favor of one legatee for life, and at his death over; no apportionment of any payment, not actually due at the decease of the first legatee, can be made in favor of his representatives (a).

An annuity to a man "and his heirs," carries the power of absolute disposition.

But, an annuity to a man "and his heirs" constitutes a perpetual annuity; the only way of satisfying it is by setting apart such a sum as would for ever answer it; and, the annuitant *would have the absolute disposition of the fund* so set aside (b): for, an annuitant by will, falls under the general character of a legatee (c); unless the testator has himself distinguished them (d).

(a) *Franks v. Noble*, 12 Ves. 534; *Habergham v. Vincent*, 2 Ves. Junr. 231; *Foley's case*, Ves. 491.

(b) *Smith v. Pybus*, 9 Ves. 2 Freem. 49. 574.

(d) *Nannock v. Horton*, 7

(c) *Sibley v. Perry*, 7 Ves. Ves. 402.

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